No. 17-1174	
Title:	Luis A. Nieves, et al., Petitioners v. Russell P. Bartlett
Docketed:	February 22, 2018
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(16-35631)
Decision Date:	October 20, 2017
Rehearing Denied:	November 21, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Feb 16 2018	Petition for a writ of certiorari filed. (Response due March 26, 2018) Petition Appendix Certificate of Word Count Proof of Service
Apr 11 2018	DISTRIBUTED for Conference of 4/27/2018.
Apr 12 2018	Response Requested. (Due May 14, 2018)
May 14 2018	Brief of respondent Russell P. Bartlett in support filed. Main Document Certificate of Word Count Proof of Service
May 29 2018	DISTRIBUTED for Conference of 6/14/2018.
Jun 18 2018	DISTRIBUTED for Conference of 6/21/2018.
Jun 27 2018	DISTRIBUTED for Conference of 6/27/2018.
Jun 28 2018	Petition GRANTED.
Jul 25 2018	Motion for an extension of time to file the opening briefs on the merits filed. Main Document
Aug 08 2018	Motion to extend the time to file the opening briefs on the merits granted. The time to file the joint appendix and petitioners' brief on the merits is extended to

	and including August 20, 2018. The time to file respondent's brief on the merits is extended to and including October 2, 2018.
Aug 09 2018	Blanket Consent filed by Petitioners, Luis A. Nieves, et al.. **Blanket Consent**
Aug 20 2018	Brief of petitioners Luis A. Nieves, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 20 2018	Joint appendix filed (1 volume). (Statement of costs filed) **Main Document** **Proof of Service**
Aug 20 2018	Motion to file volume II of the joint appendix under seal filed by respondent Russell P. Bartlett. **Main Document** **Proof of Service**
Aug 20 2018	Joint appendix (volume II under sealed) filed . (Distributed)
Aug 24 2018	Blanket Consent filed by Respondent, Russell P. Bartlett **Blanket Consent**
Aug 27 2018	Brief amici curiae of National Association of Counties, National League of Cities, U.S. Conference of Mayors, International City/County Management Association, International Municipal Lawyers Association, National Sheriffs' Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 27 2018	Brief amici curiae of The District of Columbia, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 27 2018	Brief amicus curiae of United States of America filed. **Proof of Service** **Main Document**
Sep 19 2018	DISTRIBUTED for Conference of 10/5/2018.
Oct 02 2018	Brief of respondent Russell P. Bartlett filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 02 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Oct 09 2018	SET FOR ARGUMENT ON Monday, November 26, 2018
Oct 09 2018	Motion to file volume II of the joint appendix under seal GRANTED. Justice Kavanaugh took no part in the consideration or decision of this motion.

Oct 09 2018	Brief amicus curiae of Constitutional Accountability Center filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 09 2018	Brief amici curiae of The First Amendment Foundation and Fane Lozman filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 09 2018	Brief amici curiae of Three Individual Activists filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 09 2018	Brief amicus curiae of Institute for Free Speech filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 09 2018	Brief amici curiae of National Press Photographers Association, et al. filed. **Main Document** **Proof of Service** **Certificate of Word Count** **Other**
Oct 09 2018	Brief amicus curiae of The Rutherford Institute filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Oct 09 2018	Brief amicus curiae of Institute for Justice filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 09 2018	Brief amici curiae of National Police Accountability Project, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 15 2018	Record requested from U.S.C.D. 9th Circuit.
Oct 18 2018	Record received from the U.S.C.A. 9th Circuit is electronic and located on PACER, also received are Restricted materials (1 Envelope).
Oct 18 2018	Record received from the U.S.D.C. Central District of California (Western Division - Los Angeles) is electronic and located on PACER, also received are Restricted material that's electronic.
Oct 19 2018	CIRCULATED
Oct 26 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 01 2018	Reply of petitioners Luis A. Nieves, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 26 2018	Argued. For petitioners: Dario Borghesan, Assistant Attorney General, Anchorage, Alaska; and Jeffrey B. Wall, Principal Deputy Solicitor General,

Department of Justice, Washington, D. C. (for United States, as amicus curiae.)
For respondent: Zane D. Wilson, Fairbanks, Alaska.

NAME	ADDRESS	PHONE
Attorneys for Petitioners		
Dario Borghesan Counsel of Record	State of Alaska Department of Law 1031 W. Fourth Ave. Suite 200 Anchorage, AK 99501 dario.borghesan@alaska.gov	(907) 269-5100
Party name: Luis A. Nieves, et al.		
Attorneys for Respondent		
Zane Dale Wilson Counsel of Record	CSG, Inc. 714 4th Ave., Suite 200 Fairbanks, AK 99707 zane@alaskalaw.com	9074521855
Party name: Russell P. Bartlett		
Other		
Floyd Abrams Counsel of Record	Cahill Gordon & Reindel LLP 80 Pine Street New York, NY 10005 fabrams@cahill.com	212-701-3000
Party name: Institute for Free Speech		
Robert D. Balin Counsel of Record	Davis Wright Tremaine, LLP 1251 Avenue of the Americas, 21st FL New York, NY 10020-1104 robertbalin@dwt.com	212-489-8230
Party name: National Press Photographers Association and 30 Media and Free Speech Organizations in support of Respondent		
Erin Glenn Busby Counsel of Record	727 East Dean Keeton Street Austin, TX 78705 egbusby@swbell.net	713-966-0409
Party name: The Rutherford Institute		
Noel J. Francisco Counsel of Record	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 SupremeCtBriefs@USDOJ.gov	202-514-2217

Party name: United States of America

Michelle Otero Valdes Counsel of Record	Chalos & Co, P.C. 2030 S Douglas Road, Suite 117 Coral Gables, FL 33134 mov@chaloslaw.com	3053773700

Party name: Three Individual Activists

Loren L. AliKhan Counsel of Record	D.C. Office of the Attorney General 441 4th St., NW, Suite 630 South Washington, DC 20001 loren.alikhan@dc.gov	202-727-6287

Party name: The District of Columbia

Ginger D. Anders Counsel of Record	Munger, Tolles & Olson LLP 1155 F Street NW 7th Floor Washington, DC 20004 ginger.anders@mto.com	2022201107

Party name: The First Amendment Foundation and Fane Lozman

Bennett L. Cohen Counsel of Record	Polsinelli, PC 1401 Lawrence St. Suite 2300 303-572-9300, CO 80202 bcohen@polsinelli.com	(303)-572-9300

Party name: National Association of Counties, National League of Cities, U.S. Conference of Mayors, International City/County Management Association, International Municipal Lawyers Association, National Sheriffs' Association

Brianne Jenna Gorod Counsel of Record	Constitutional Accountability Center 1200 18th Street, NW Suite 501 Washington, DC 20036 brianne@theusconstitution.org	202 296 6889

Party name: Constitutional Accountability Center

Michael B. Kimberly Counsel of Record	Mayer Brown, LLP 1999 K Street, NW Washington, DC 20006 mkimberly@mayerbrown.com	(202) 263-3127

Party name: Institute for Justice

David Michael Shapiro Counsel of Record	375 East Chicago Avenue Chicago, IL 60611 david.shapiro@law.northwestern.edu	312-503-0711

Party name: National Police Accountability Project, Roderick & Solange MacArthur Justice Center, American Civil Liberties Union, and ACLU Of Alaska

No. 17-

In The
Supreme Court of the United States

LUIS A. NIEVES and BRYCE L. WEIGHT,

Petitioners,

v.

RUSSELL P. BARTLETT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAHNA LINDEMUTH
Attorney General
STATE OF ALASKA

DARIO BORGHESAN*
Assistant Attorney General

ANNA R. JAY
Assistant Attorney General

1031 W. Fourth Ave.,
Suite 200
Anchorage, AK 99501
(907) 269-5100
dario.borghesan@alaska.gov

*Counsel of Record

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court held that probable cause defeats a First Amendment retaliatory-prosecution claim under 42 U.S.C. § 1983 as a matter of law. Does probable cause likewise defeat a First Amendment retaliatory-arrest claim under § 1983?

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PETITION FOR A WRIT OF CERTIORARI

The Alaska Attorney General, on behalf of Alaska State Troopers Luis Nieves and Bryce Weight, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum opinion and order of the court of appeals, App. 1-6, is not yet reported. The opinion of the district court, App. 7-39, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 2017. App. 1. A petition for rehearing was denied on November 21, 2017. App. 40. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I.

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Following his arrest for disorderly conduct and harassment, respondent Russell Bartlett sued the arresting officers, petitioners Luis Nieves and Bryce Weight, for damages under 42 U.S.C. § 1983, alleging false arrest and imprisonment, excessive force, malicious prosecution, retaliatory arrest, and violations of the right to due process and equal protection. App. 15. The district court granted summary judgment in favor of the officers on all claims. App. 39. On appeal, the circuit court affirmed dismissal of all claims except for retaliatory arrest. App. 2-7. Despite ruling that there was probable cause to arrest the respondent, the court reasoned that the existence of probable cause does not bar a retaliatory-arrest claim, distinguishing this Court's

decisions in *Reichle v. Howards*, 566 U.S. 658 (2012), and *Hartman v. Moore*, 547 U.S. 250 (2006). App. 3, 5-6. The circuit court reversed summary judgment on the retaliatory-arrest claim and remanded it for trial. App. 6.

1. Every spring, thousands of extreme skiers, snowmobilers, and spectators gather in the remote Hoodoo Mountains of interior Alaska for Arctic Man, a multi-day festival centered around a high-speed ski and snowmobile race. App. 8. Campers congregate at night to drink and party, and rampant alcohol use compounds safety concerns at the event. C.A. S.E.R. 374-76.

On the last day of Arctic Man in 2014, Troopers Luis Nieves and Bryce Weight were on duty, patrolling a large outdoor party where minors appeared to be drinking alcohol. App. 8. Nieves encountered respondent Russell Bartlett at the party and attempted to speak with him, but Bartlett declined to talk to Nieves. App. 8. Meanwhile, Trooper Weight spotted a minor who appeared to be drinking alcohol and began speaking to him at the edge of the crowd. App. 9. Bartlett marched up to Weight, loudly demanding that Weight stop talking to the minor. App. 9.

The district court, reviewing video footage of the incident, found that "Trooper Weight, Mr. Bartlett, and the minor [were] standing very close together exchanging words" and that "Bartlett's right hand was at roughly shoulder height within inches of Trooper

Weight's face."[1] App. 11-12. The 5'9", 240-pound Bartlett, who at the time of the incident was too intoxicated to drive, C.A. S.E.R. 413, 416, later maintained that his close proximity to Trooper Weight and loud voice were appropriate given the volume of music at the party, but Trooper Weight viewed Bartlett's "escalating voice, his look of anger, [and] his body language" as "hostile" "pre-assault indicators." C.A. E.R. 89. To create a safe space for himself, Trooper Weight placed his open palms on Bartlett's chest and pushed him back. App. 9; C.A. E.R. 89.

Trooper Nieves, believing that Bartlett posed a danger to Weight, ran to help. C.A. E.R. 69-70. Following a struggle, the troopers were able to subdue and arrest Bartlett. App. 12.

He was released without injury after a few hours in the "drunk tank." App. 10; C.A. S.E.R. 412. Bartlett was charged with disorderly conduct and resisting arrest. App. 12-13. The prosecution later dismissed the case for budgetary reasons, but the assigned prosecutor stated to the district court that he believed probable cause existed to charge Bartlett for disorderly conduct, resisting arrest, and assault. App. 14; C.A. E.R. 110.

2. Bartlett sued Troopers Weight and Nieves, asserting false arrest and imprisonment, excessive force, malicious prosecution, retaliatory arrest, and violations

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[1] The camera's view of Bartlett's hand was partially blocked, so the video does not show, and the parties dispute, whether Bartlett raised his hand to Weight's face before the trooper pushed him back or after. App. 9, 12.

of due process and equal protection under 42 U.S.C. § 1983, as well as conspiracy under 42 U.S.C. § 1985. App. 15. The district court granted summary judgment in favor of petitioners on all claims. App. 39.

On the false arrest and imprisonment claims, the court ruled there was probable cause to arrest Bartlett for harassment, so the officers were entitled to summary judgment. App. 22. The court ruled that the existence of probable cause also barred respondent's First Amendment retaliatory-arrest claim, noting that this Court "has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause." App. 36 (quoting *Reichle*, 566 U.S. at 664-65).

The district court dismissed the excessive force claim after concluding that no reasonable jury could find the troopers' use of force unconstitutionally excessive, App. 34-35, and dismissed the malicious prosecution claim as unsupported by any evidence, App. 26-27. It dismissed respondent's Fourteenth Amendment claim (based on his allegation that the troopers failed to preserve third-party video footage of the incident) because the respondent was not subject to a lengthy period of detention, there was no evidence that the footage was withheld or concealed, and the footage was not exculpatory anyway. App. 38. Finally, the court granted summary judgment to the officers on the conspiracy claim, concluding that respondent failed to allege the class-based animus that is the predicate for an equal protection claim under § 1985. App. 38-39. The court also reasoned that the legal inadequacy of his

§ 1983 claims precluded § 1985 conspiracy claims predicated on the same allegations. App. 39. Accordingly, the district court entered summary judgment in petitioners' favor on all claims and dismissed the case with prejudice. App. 39.

3. Respondent appealed the district court's decision to the Court of Appeals for the Ninth Circuit. App. 2. The Ninth Circuit affirmed on all claims except for retaliatory arrest. App. 2-7. The appellate court ruled that the troopers had probable cause to arrest Bartlett for assault, disorderly conduct, harassment, and resisting arrest. App. 3. Nevertheless, the court reiterated its earlier holding in *Ford v. City of Yakima*, 706 F.3d 1188, 1196 (9th Cir. 2013), that the existence of probable cause for an arrest does not bar a plaintiff's claim that the arrest was retaliatory in violation of the First Amendment. App. 4-5. Pointing to respondent's allegation (uncorroborated by other witness testimony, audio or video recording) that Trooper Nieves said after the arrest, "Bet you wish you would have talked to me now," the court ruled that a jury might be persuaded that Bartlett was arrested for his earlier refusal to assist with the investigation, rather than for his harassing and belligerent conduct. App. 6, 10-12, 36-37. The court thus reversed the grant of summary judgment on the retaliatory-arrest claim and remanded for trial. App. 6.

Bartlett moved for reconsideration of the court's judgment, but the court denied his motion. App. 40.

REASONS FOR GRANTING THE PETITION

This Court recently granted certiorari in *Lozman v. City of Riviera Beach, Florida*, No. 17-21, to decide whether probable cause to arrest defeats a First Amendment retaliatory-arrest claim under 42 U.S.C. § 1983 as a matter of law. Because this petition seeks review of the same question presented in *Lozman*, the Court should grant this petition and hold it for disposition in accordance with the Court's decision in the *Lozman* case.

CONCLUSION

This petition for a writ of certiorari should be held pending this Court's decision in *Lozman v. City of Riviera Beach, Florida*, No. 17-21, and disposed of in accordance with the Court's decision in that case.

Respectfully submitted,

JAHNA LINDEMUTH
Attorney General
STATE OF ALASKA

DARIO BORGHESAN*
Assistant Attorney General

ANNA R. JAY
Assistant Attorney General

**Counsel of Record*

FEBRUARY 2018

2017 WL 4712440
Only the Westlaw citation
is currently available. This case was not
selected for publication in West's Federal
Reporter. See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also U.S.Ct.
of App. 9th Cir. Rule 36-3. United States
Court of Appeals, Ninth Circuit.

Russell P. BARTLETT, Plaintiff-Appellant,
v.
Luis A. NIEVES, in his personal capacity
and Bryce L. Weight, in his personal
capacity, Defendants-Appellees.

No. 16-35631
|
Argued and Submitted October 6, 2017
Seattle, Washington
|
Filed October 20, 2017

Appeal from the United States District Court for the
District of Alaska, Sharon L. Gleason, District Judge,
Presiding, D.C. No. 4:15-cv-00004-SLG

Attorneys and Law Firms

Zane D. Wilson, Cook, Schuhmann & Groseclose Inc., Fairbanks, AK, for Plaintiff-Appellant

Ruth Botstein, Esquire, Assistant Attorney General, AGAK – Office of the Alaska Attorney General (Anchorage), Anchorage, AK, for Defendants-Appellees

Before: WARDLAW, CLIFTON, and OWENS, Circuit Judges.

MEMORANDUM*

Plaintiff-Appellant Russell P. Bartlett appeals the district court's grant of summary judgment to Alaska state trooper Defendants-Appellees Luis A. Nieves and Bryce L. Weight on his § 1983 claims of false arrest, excessive force, malicious prosecution, and retaliatory arrest. We review the district court's grant of summary judgment de novo. *Garcia v. Cty. of Merced*, 639 F.3d 1206, 1208 (9th Cir. 2011). We affirm in part and reverse in part.

1. We affirm the district court's grant of summary judgment to the defendants on plaintiff's false arrest claim on the ground of qualified immunity. A two-part test applies to qualified immunity claims. Construing the facts in the light most favorable to the party alleging injury, the court must evaluate: 1) whether the officer violated a constitutional right; and 2) whether that right was clearly established at the time of the officer's actions. *See Lal v. California*, 746 F.3d 1112, 1116 (9th Cir. 2014) (citing *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009)).

Adopting Bartlett's version of the facts, we agree with the district court that defendants had at least

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

arguable probable cause to arrest Bartlett for harassment, disorderly conduct, resisting arrest, or assault under Alaska law. When Sergeant Nieves initiated Bartlett's arrest, he knew that Bartlett had been drinking, and he observed Bartlett speaking in a loud voice and standing close to Trooper Weight. He also saw Trooper Weight push Bartlett back. Although Bartlett may have his own explanations for his actions, these explanations were not known to Sergeant Nieves; the test is whether "the information the officer had at the time of making the arrest" gave rise to probable cause. *John v. City of El Monte*, 515 F.3d 936, 940 (9th Cir. 2008). We agree with the district court that it did; a reasonable officer in Sergeant Nieves's position could have concluded that Bartlett stood close to Trooper Weight and spoke loudly in order to "challenge" him, provoking Trooper Weight to push him back. *See* Alaska Stat. § 11.61.120(a)(1). Therefore, we affirm the district court's grant of summary judgment to the troopers on Bartlett's false arrest claim.

2. We affirm the district court's grant of summary judgment to the troopers on Bartlett's excessive force claim on the ground of qualified immunity. In particular, Bartlett has failed to point to a case that clearly establishes that the troopers' limited use of force to effect his arrest was unconstitutional. Bartlett's references to *Young v. County of Los Angeles*, 655 F.3d 1156 (9th Cir. 2011), and *Blankenhorn v. City of Orange*, 485 F.3d 463 (9th Cir. 2007), are unavailing. In the present case, the troopers reacted quickly to a fluid situation and were faced with the undisputedly challenging

circumstances of Arctic Man. These circumstances were not present in *Young* and *Blankenhorn*. Because the second prong of the qualified immunity test requires "a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment," and we are not aware of any such case, we agree with the district court that the officers are entitled to qualified immunity on Bartlett's excessive force claim. *See White v. Pauly*, ___ U.S. ___, 137 S.Ct. 548, 552, 196 L.Ed.2d 463 (2017) (instructing that clearly established law must be "particularized" to the facts of the case).

3. We also affirm the district court's grant of summary judgment on Bartlett's malicious prosecution claim. To prevail on his malicious prosecution claim, Bartlett must show that the troopers prosecuted him: 1) with malice; 2) without probable cause; and 3) for the purpose of denying him a specific constitutional right. *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995). Because we conclude that the officers had probable cause to arrest Bartlett, we affirm the grant of summary judgment to the troopers on this claim.

4. We reverse the district court's dismissal of Bartlett's retaliatory arrest claim. The district court dismissed this claim on the ground that the troopers had probable cause to arrest Bartlett. However, we have previously held that a plaintiff can prevail on a retaliatory arrest claim even if the officers had probable cause to arrest. *See Ford v. City of Yakima*, 706 F.3d 1188, 1195-96 (9th Cir. 2013) ("[A]n individual has a

right to be free from retaliatory police action, even if probable cause existed for that action.").

The Supreme Court's decision in *Reichle v. Howards*, 566 U.S. 658, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012), does not foreclose this result. In *Reichle*, the Court noted that it had not previously recognized a First Amendment right to be free from a retaliatory arrest supported by probable cause, but did not conclude that a plaintiff must show lack of probable cause to make a retaliatory arrest claim. *Id.* at 664-65, 132 S.Ct. 2088. Indeed, the Court emphasized that the rule that it announced in *Hartman v. Moore*, 547 U.S. 250, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006), which held that a plaintiff cannot make a retaliatory *prosecution* claim if the charges were supported by probable cause, does not necessarily extend to retaliatory arrests. *Reichle*, 566 U.S. at 666-70, 132 S.Ct. 2088.

We have since clarified that in the Ninth Circuit, a plaintiff can make a retaliatory arrest claim even if the arresting officers had probable cause. When the troopers arrested Bartlett at Arctic Man in 2014, it was clearly established that "an individual has a right to be free from retaliatory police action, even if probable cause existed for that action." *Ford*, 706 F.3d at 1195-96. Therefore, the district court erred in concluding that Bartlett's retaliatory arrest claim fails simply because the troopers had probable cause to arrest him.

Bartlett has potentially established a claim of retaliatory arrest in violation of the First Amendment because 1) he has "demonstrate[d] that the officers' conduct would chill a person of ordinary firmness from

future First Amendment activity" and 2) the evidence that he has advanced would enable him "ultimately to prove that the officers' desire to chill his speech was a but-for cause of their allegedly unlawful conduct." *Id.* at 1193.

Regarding the first prong of the test, we have held that an arrest in retaliation for the exercise of free speech is sufficient to chill speech. *Lacey v. Maricopa Cty.*, 693 F.3d 896, 917 (9th Cir. 2012). Regarding the second prong, we have held that, once a plaintiff has provided "sufficient evidence for a jury to find that the officers' retaliatory motive was a but-for cause of their action," "the issue of causation ultimately should be determined by a trier of fact." *Ford*, 706 F.3d at 1194. Construing the facts in the light most favorable to Bartlett, he has advanced sufficient evidence to meet this standard. Most importantly, Bartlett alleged that Sergeant Nieves said "bet you wish you would have talked to me now" after his arrest. This statement, if true, could enable a reasonable jury to find that Sergeant Nieves arrested Bartlett in retaliation for his refusal to answer Sergeant Nieves's questions earlier in the evening. We therefore conclude that the district court erred in granting summary judgment for the troopers on Bartlett's retaliatory arrest claim.

Each party to bear its own costs.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

2016 WL 3702952
Only the Westlaw citation is currently available.
United States District Court,
D. Alaska.

Russell P. Bartlett, Plaintiff,
v.
Luis A. Nieves, et al., Defendants.

Case No. 4:15-cv-00004-SLG
|
Signed 07/07/2016

ORDER RE ALL PENDING MOTIONS

Sharon L. Gleason, UNITED STATES DISTRICT JUDGE

Three motions are currently pending before the Court. Plaintiff Russell P. Bartlett filed a Motion for Partial Summary Judgment at Docket 38, seeking a ruling that he did not resist arrest. Defendants Luis A. Nieves and Bryce L. Weight, both Alaska State Troopers, filed a Motion for Summary Judgment at Docket 46 seeking a ruling in their favor on all counts. The third motion is Mr. Bartlett's Motion and Memorandum for Summary Judgment Regarding There Being No Probable Cause to Charge Mr. Bartlett With Resisting Arrest at Docket 60. Oral argument was not requested by any party and was not necessary to the Court's determination of these motions.

BACKGROUND

This case arises from an encounter between Mr. Bartlett and Defendants during an annual event called Arctic Man. The relevant facts are largely undisputed, although the parties present different interpretations of each other's conduct related to the case. Defendants describe Arctic Man as "an extreme ski event held annually in the Hoodoo Mountains near Paxson, Alaska" that features a "remote location, large crowds, and . . . high levels of alcohol use."[1] Mr. Bartlett does not dispute this characterization. On April 13, 2014, the last night of Arctic Man 2014, Mr. Bartlett attended a party in the event's parking lot.[2] Troopers Nieves and Weight were investigating underage drinking at the party.[3]

The facts when viewed in the light most favorable to Plaintiff for purposes of the pending motions[4] are as follows:

Trooper Nieves approached Mr. Bartlett while he was standing outside a motorhome (RV), tapped him on the shoulder, and asked if they could talk.[5] Mr. Bartlett responded, "What for?"[6] Trooper Nieves said, "You look like you're pretty interested in what was going on over there." Mr. Bartlett stated, "I don't want to talk to

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[1] Docket 47 (Defendants' Mem. in Support of Mot. for Summary Judgment) at 1-2.

[2] Docket 29 (Amended Complaint) at 1.

[3] Docket 47-2 (Nieves Dec.) at 2-3.

[4] *See infra*, at 8-10.

[5] Docket 57-4 (Bartlett Deposition) at 4-5.

[6] *Id.* at 5.

you" and asked if he was free to go. Trooper Nieves then walked away. Shortly thereafter, at approximately 1:30 a.m., Mr. Bartlett was in the middle of a crowd and noticed that a minor he had attended the party with, M.W., was at the edge of the crowd conversing with Trooper Weight.[7] Mr. Bartlett testified that he and a friend walked over to Trooper Weight and M.W. Mr. Bartlett "stood at a distance from each of them as seemed appropriate to communicate over the loud music"[8] and said, "You don't have the authority to talk to him without a parent or guardian present."[9] Trooper Weight said, "No" and pushed Mr. Bartlett backwards. Mr. Bartlett testified that at the time of the push, his "right hand had rose [] up a little bit"[10] but that his "hands rose up in reaction to Weight lunging at me/the shove."[11] Trooper Nieves approached and grabbed Mr. Bartlett's left arm and started yelling, "Back up." Trooper Weight then walked up and grabbed Mr. Bartlett's right arm. Both officers repeatedly yelled at Mr. Bartlett, "Get on the ground."[12] The troopers tried to force Mr. Bartlett to the ground; he hesitated so as to not aggravate an earlier back injury.[13] The troopers threatened Mr. Bartlett with a Taser; then he "went

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[7] Docket 57-4 at 9-10.

[8] Docket 57-13 (Bartlett Aff.) at 1.

[9] Docket 57-4 at 11.

[10] Docket 57-4 at 14.

[11] Docket 57-13 at 2.

[12] Docket 57-4 at 12-13.

[13] Docket 47-7 at 8.

prone on [his] stomach and voluntarily placed [his] hands behind his back."[14]

Mr. Bartlett was placed in a trooper vehicle; he asked what was going on. Trooper Nieves said, "You're going to jail."[15] When Mr. Bartlett asked why, Trooper Nieves said, "For harassing my trooper." Mr. Bartlett asserts that Trooper Nieves then said, "Bet you wish you would have talked to me now."[16] In the jail tent at Arctic Man, Mr. Bartlett asked to have his handcuffs loosened, and they were loosened immediately.[17] Mr. Bartlett did not suffer any physical injuries as a result of his arrest.[18]

Troopers Weight and Nieves then drafted a police report of the incident, which Mr. Bartlett asserts was fabricated in that it contains many false statements.[19] In that report, Trooper Weight characterized Mr. Bartlett as "hostile and aggressive," and "combative in nature."[20] Trooper Weight also wrote that Mr. Bartlett "attempted to 'head-butt' [Trooper] Nieves, but was unsuccessful."[21] Trooper Nieves wrote that Mr. Bartlett had shouted at the RV occupants that they did not have to speak with the trooper or allow him inside the

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[14] Docket 57-13 at 2.

[15] Docket 57-4 at 17.

[16] Docket 57-4 at 17.

[17] Docket 47-7 at 5.

[18] Docket 47-7 at 11.

[19] Docket 29 (Amended Complaint) at 2.

[20] Docket 7-1 (Incident Report) at 3.

[21] *Id.* at 4.

RV. Trooper Nieves also wrote that after Trooper Weight pushed Mr. Bartlett away, "I immediately grabbed a hold of Bartlett and advised him he was under arrest for disorderly conduct. Bartlett clenched his right fist as I grabbed his left arm, shouting no. I advised him again that he was under arrest, as he pulled away from me, as he swung his right fist towards me."[22] Mr. Bartlett asserts that he "did not charge at Weight or Nieves, nor did [he] attempt to throw any punches or to head-butt anyone. At no time did [he] attempt to harm Weight or Nieves, and the whole incident occurred in a matter of seconds."[23]

The parties have submitted several copies of a local television news video of the incident, including an enhanced video showing a high resolution depiction of the key interaction between Mr. Bartlett and the troopers.[24] Certain aspects of the video are indeed susceptible to more than one interpretation, as the parties have demonstrated in their briefing. But other aspects are indisputable, and are, in fact, undisputed.[25] The enhanced video indisputably shows Trooper Weight, Mr. Bartlett, and the minor standing very close together exchanging words. Trooper Weight and Mr. Bartlett are face to face, with Trooper Weight on the left of the screen, Mr. Bartlett on the right, and the minor in the

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[22] *Id.*

[23] Docket 57-13 at 2-3.

[24] Docket 1, Ex. A (News Story Video); Docket 47-9 (Enhanced Video).

[25] *See Scott v. Harris*, 550 U.S. 372, 380-81 (2007) (authorizing courts to consider video evidence at summary judgment).

center with his back to the camera. In the video, the minor is standing in a position that obscures the closest point of contact between Trooper Weight and Mr. Bartlett, but the enhanced video reveals that at the time of the push, Mr. Bartlett's right hand was at roughly shoulder height within inches of Trooper Weight's face. Trooper Nieves approaches from the right with his back to the camera. Mr. Bartlett falls backwards as Trooper Nieves reaches him and grabs his left arm. As Trooper Nieves and Mr. Bartlett move to the right side of the screen, Mr. Bartlett's right arm swings back, extended, then comes forward as Trooper Nieves maneuvers behind Mr. Bartlett. Trooper Weight approaches from the left and secures Mr. Bartlett's right arm. Trooper Weight does a leg sweep on Mr. Bartlett's right leg that brings Mr. Bartlett down on one knee.[26] Mr. Bartlett then goes down on his hands and knees as the troopers continue to try to get him all the way to the ground. Mr. Bartlett appears to submit to the takedown when the troopers tell him he is going to "get tased." The troopers then arrest Mr. Bartlett and tell him he is going to jail for harassment. Mr. Bartlett also submitted an audio recording from another officer on the scene, in which the arrest seems to be reported as for disorderly conduct and "challenging a Trooper to a fight."[27]

On April 14, 2014, Mr. Bartlett was charged with disorderly conduct and resisting or interfering with

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[26] *See* Docket 65, Ex. AD (Frame-by-Frame PDF of Video).

[27] Docket 57-17 (Audio of Officer Minor).

arrest.[28] During discovery, two attendees of the party who were inside the RV each testified that they did not hear Mr. Bartlett shout at anyone inside the RV.[29] Trooper Nieves testified at his deposition that he was assigned to have the news crew ride with him, that "they placed a [wireless] mic on me," and that the TV crew was with him when he arrived at the party but he did not know if the incident was recorded.[30] On May 5, 2014, Mr. Bartlett requested discovery in his criminal case from the State of Alaska of any tape or videotape recordings taken at the scene.[31] On May 29, 2014, a paralegal from the District Attorney's office emailed Trooper Weight, inquiring whether he had any audio recordings of the incident.[32] Trooper Weight responded on May 30, 2014 that he did not have any audio of the incident because it "escalated very quickly and I did not have the opportunity to start my audio, prior to having to go hands on and effecting the arrest."[33] On July 16, 2014, Mr. Bartlett's attorney sent a letter to Assistant District Attorney Raymond Beard that indicated that "there may have been an individual on the scene" who videotaped the events and requested the name, addresses, and phone numbers of any such

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[28] Docket 7-2 (Criminal Complaint).

[29] Docket 57-9 (Deposition of Jerry Sadler, Jr.); 57-10 (Aff. of Sierra Contento).

[30] Docket 57-5 (Deposition of Trooper Nieves) at 9-14.

[31] Docket 57 at 14. *See also* Docket 57-19 at 1-2 (Request for Discovery).

[32] Docket 57-19 at 3 (District Attorney's Office Email).

[33] Docket 57-19 at 4 (Email between Trooper Weight and District Attorney's Office).

individual.[34] On July 17, 2014, the District Attorney's office emailed the troopers regarding the request.[35] Trooper Nieves responded on the same day, reporting that there may be video from "Channel 2 perhaps. Nothing in our possession or under our control."[36] On August 12, 2014, Mr. Beard reported to Mr. Bartlett's attorney, "I do not know whether some private person videotaped the incident. I would certainly want to view any such video if it exists, and the State would provide that evidence to you if it were in our possession, but is [sic] not. If you are able to locate such a recording, I would greatly appreciate the opportunity to inspect and copy."[37] Mr. Bartlett asserts that on or about October 1, 2014, he located a KTVA news video of the incident.[38] Mr. Beard had reviewed the video by December 1, 2014.[39]

The State declined Mr. Bartlett's December 2014 and January 2015 requests to dismiss the criminal case. However, on February 4, 2015, the State dismissed the charges against Mr. Bartlett.[40]

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[34] Docket 57-19 at 5 (Letter).

[35] Docket 57-19 at 6 (District Attorney's Office Email).

[36] Docket 57-19 at 7 (Nieves Email).

[37] Docket 57-19 at 9 (Beard Email).

[38] Docket 57 at 14. *See also* Docket 57-19 at 10 (Bartlett Email).

[39] Docket 57-19 at 11 (Beard Email).

[40] Docket 7-3 (Dismissal).

Mr. Bartlett initiated this action on March 2, 2015.[41] Mr. Bartlett's Amended Complaint raises claims under 42 U.S.C. § 1983 for violation of his constitutional rights "to be free from unlawful assault by a police officer, to be free from a malicious criminal prosecution, to not be falsely incarcerated, unreasonable search and seizure, freedom of speech, equal protection of the law and his right to due process."[42] Mr. Bartlett also alleges a conspiracy claim under 42 U.S.C. § 1985.[43]

DISCUSSION

I. Jurisdiction

The Court has jurisdiction under 28 U.S.C. §§ 1343(a)(3) and 1331 because Mr. Bartlett alleges violations of his federal constitutional rights.

II. Summary Judgment Standard

Federal Rule of Civil Procedure 56(a) directs a court to "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The burden of showing the absence of a genuine dispute of material fact lies with the moving party.[44] If the moving party meets this burden, the

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[41] Docket 1 (Complaint).

[42] Docket 29 at 4.

[43] *Id.*

[44] *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

non-moving party must present specific factual evidence demonstrating the existence of a genuine issue of fact.[46] The non-moving party may not rely on mere allegations or denials. He must demonstrate that enough evidence supports the alleged factual dispute to require a finder of fact to make a determination at trial between the parties' differing versions of the truth.[46]

When considering a motion for summary judgment, a court views the facts in the light most favorable to the non-moving party and draws "all justifiable inferences" in the non-moving party's favor.[47] To reach the level of a genuine dispute, the evidence must be such "that a reasonable jury could return a verdict for the non-moving party."[48] If the evidence provided by the non-moving party is "merely colorable" or "not significantly probative," summary judgment is appropriate.[49]

III. Qualified Immunity Standard

"The doctrine of qualified immunity protects government officials 'from liability for civil damages

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[45] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

[46] *Id.* (citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968)).

[47] *Id.* at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)).

[48] *Id.* at 248.

[49] *Anderson*, 477 U.S. at 249.

insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[50] The purpose of qualified immunity is to "balance[] two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[51] Qualified immunity is a question of law, not a question of fact.[52] And because qualified immunity is immunity from suit, not just from liability, "[i]mmunity ordinarily should be decided by the court long before trial."[53]

Government officials are not entitled to qualified immunity on summary judgment if (1) the facts taken in the light most favorable to the plaintiff show that the officials' conduct violated a constitutional right, and (2) that right was clearly established at the time of the alleged violation.[54] Both prongs of the analysis

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[50] *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

[51] *Pearson*, 555 U.S. at 231.

[52] *See Torres v. City of Los Angeles*, 548 F.3d 1197, 1210 (9th Cir. 2008).

[53] *Sjurset v. Button*, 810 F.3d 609, 617 (9th Cir. 2015) (quoting *Hunter v. Bryant*, 502 U.S. 224, 228 (1991)).

[54] *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *receded from by Pearson*, 555 U.S. at 232-36. The Court notes that recent Supreme Court cases seem to merge these two prongs, and it may be that the law on qualified immunity is evolving. *See, e.g., Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Pearson*, 555 U.S. at 231, but omitting the two-prong configuration). However, the Ninth Circuit thus far applies the two-prong approach. *See Garcia v. Cty. of Riverside*, 817 F.3d 635, 639 (9th Cir. 2016). In any event, the

must be satisfied, so that if a court determines that one prong is not met, qualified immunity applies. A court may consider either prong first.[55]

For a constitutional right to be clearly established, its contours must be "sufficiently clear that every reasonable official would have understood that what he is doing violates that right."[56] Courts should not define clearly established law at a high level of generality; otherwise, qualified immunity becomes no immunity at all if the only prerequisite is a constitutional violation.[57] Put simply, "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law."[58]

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outcome of this case is the same regardless of how the qualified immunity test is stated.

[55] *Pearson*, 555 U.S. at 236 ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

[56] *Ashcroft v. al-Kidd*, 536 U.S. 731, 741 (2011) (internal quotation marks removed).

[57] *Id.* at 2084.

[58] *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244 (2012) (internal quotation marks omitted) (quoting *al-Kidd*, 563 U.S. at 743).

IV. False Arrest and False Imprisonment

Mr. Bartlett alleges that he was falsely arrested and imprisoned in violation of his federal constitutional rights.

"It is well established that an arrest without probable cause violates the Fourth Amendment."[59] "Under the Fourth Amendment, [probable cause] exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested."[60] In this inquiry, "the ultimate touchstone . . . is 'reasonableness.'"[61] "To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.'"[62] If "it was reasonable for an officer to suspect that the defendant's conduct was illegal," then "there was no violation of the Fourth Amendment."[63] The standard is objective, and so "[w]e do not examine the

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[59] *Rosenbaum v. Washoe Cty.*, 663 F.3d 1071, 1076 (9th Cir. 2011) (quotation marks and citation omitted).

[60] *Sialoi v. City of San Diego*, ___ F.3d ____, No. 14-55387, 2016 WL 2996138, at *5 (9th Cir. May 24, 2016) (citation omitted).

[61] *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014) (quoting *Riley v. California*, 134 S. Ct. 2473, 2482 (2014)).

[62] *Id.* (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

[63] *Heien*, 135 S. Ct. at 539.

subjective understanding of the particular officer involved."[64]

Moreover, an officer who makes an arrest without probable cause may still be entitled to qualified immunity if it was "*reasonably arguable* that there was probable cause for arrest – that is, whether reasonable officers could disagree as to the legality of the arrest."[65] Applied to this case, if reasonable officers could disagree about the legality of Mr. Bartlett's arrest, the troopers would be entitled to qualified immunity even if Mr. Bartlett was arrested without probable cause in violation of the Fourth Amendment.

At the time of the incident, Defendants told Mr. Bartlett he was being arrested for harassment. Under Alaska law, a person commits "harassment in the second degree if, with intent to harass or annoy another person, that person . . . insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response."[66] Defendants assert that "[a] prudent police officer could believe that probable cause existed that Bartlett had committed harassment because he intended to annoy Trooper Weight by challenging or taunting him to stop speaking with the

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[64] *Id. See also Tatum v. City and Cty. of San Francisco*, 441 F.3d 1090, 1094 (9th Cir. 2006) ("Under *Devenpeck*, the subjective reason that [the officer] arrested [the defendant] is irrelevant so long as the available facts suggested that [defendant] was committing a crime.").

[65] *Rosenbaum*, 663 F.3d at 1076 (citation omitted) (emphasis in original).

[66] AS 11.61.120(a)(1).

minor through his demands, his loud voice, and his close physical presence."[67] Mr. Bartlett responds that he spoke loudly only to be heard over the loud music and that his "right hand was never raised toward Weight in a threatening manner."[68] Mr. Bartlett "testified that his right hand rose only in reaction to Weight's shove but that before being shoved, his right hand was close to his hip."[69] Mr. Bartlett maintains that "[r]easonable jurors could conclude that no probable or arguable probable cause existed to arrest Bartlett" for harassment because (1) a jury must resolve whether Bartlett's conduct was threatening, and (2) "[j]ust because Weight and Nieves responded violently to Bartlett's speech does not mean that reasonable Alaskan police officers confronting the same situation would have so acted."[70]

Plaintiff acknowledges that Mr. Bartlett caused the troopers to "respond violently" to him – an element of harassment. And, viewing all the facts in the light most favorable to Mr. Bartlett, i.e. that Mr. Bartlett did not intend to threaten Trooper Weight and his hand gesture occurred because of the shove – Mr. Bartlett's gesture as depicted in the video could nonetheless be interpreted by a reasonable officer as a challenge or taunt sufficient to support probable cause to arrest Mr.

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[67] Docket 47 at 17.

[68] Docket 57 at 7-8.

[69] Docket 57 at 8. *See also*, Docket 57-4 (Deposition of Bartlett) at 14-15.

[70] Docket 57 at 25.

Bartlett for harassment.[71] Particularly given the troopers' heightened challenges while investigating underage drinking at 1:30 a.m. at a crowded, large, remote event like Arctic Man, a reasonable officer could interpret a loud person acting as depicted in the videos as having committed harassment as defined in AS 11.61.120. Thus, based on Mr. Bartlett's description of the facts and the video, because a reasonable officer could suspect that Mr. Bartlett's conduct was illegal harassment, there was no Fourth Amendment violation. Accordingly, Defendants are entitled to summary judgment on Mr. Bartlett's false arrest and false imprisonment claims.

Moreover, even if there was no probable cause for the arrest, it is reasonably arguable that there was probable cause to find that the crime of harassment had occurred, and reasonable officers could disagree about the legality of the arrest. Stated differently, Mr. Bartlett has not demonstrated that clearly established law prohibited the troopers from considering his conduct threatening enough to constitute probable cause that the crime of harassment had occurred so as to justify the arrest.[72] Accordingly, Defendants are entitled

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[71] In his opposition to Defendants' summary judgment motion, Plaintiff indicates that the officers had perceived Mr. Bartlett's actions as "a taunt that [Defendants] could not leave unpunished. . . ." Docket 57 at 32.

[72] Having found that probable cause existed to arrest Mr. Bartlett for harassment, the Court does not address whether probable cause also existed to arrest Mr. Bartlett for disorderly conduct, assault, and/or resisting arrest.

to qualified immunity on Mr. Bartlett's false arrest and false imprisonment claims.

In light of the foregoing, the Court will deny as moot: (1) Mr. Bartlett's Motion for Partial Summary Judgment at Docket 38, which is focused on whether Mr. Bartlett resisted arrest under Alaska law, and (2) Mr. Bartlett's Motion for Summary Judgment Regarding There Being No Probable Cause to Charge Mr. Bartlett With Resisting Arrest at Docket 60.

V. Malicious Prosecution

Mr. Bartlett maintains that his malicious prosecution § 1983 claim should survive summary judgment under two alternative theories. First, he asserts he has "a liberty interest under the Fourteenth Amendment to be free 'from criminal charges premised on fabricated evidence'"; second, he maintains that "pretrial limitations on a defendant's liberty may amount to a seizure within the meaning of the Fourth Amendment."[73] Mr. Bartlett acknowledges that his second theory is dependent upon his right to be free from false arrest and unreasonable seizures, as to which the Court has granted summary judgment to Defendants, above. Thus, the remaining malicious prosecution issue is whether Defendants are entitled to summary judgment on Mr. Bartlett's claim to be free from

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[73] Docket 57 at 37-38.

prosecution from criminal charges premised on fabricated evidence.[74]

Mr. Bartlett maintains that the troopers' initial report was fabricated because contrary to what is set out in that report: (1) he was never told he was under arrest; (2) he did not slur his speech; (3) he did not headbutt anyone; (4) he did not shout at the RV occupants; (5) he did not charge up to Trooper Weight or position himself between the trooper and the minor; (6) he did not come after Trooper Weight after the shove; and (7) he was not highly intoxicated.[75]

The Ninth Circuit has recognized "there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government."[76] However, as a general rule, and even when evidence has been fabricated by investigating officers, the "[f]iling of a criminal complaint immunizes

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[74] Mr. Bartlett did not plead a state law malicious prosecution claim in his Amended Complaint. *See* Docket 29 at 4. But both parties address such a claim in their summary judgment briefing. *See* Docket 47 (Motion) at 37; Docket 57 (Opp.) at 40-42. Under Alaska law, the elements of a malicious prosecution cause of action are (1) a criminal proceeding instituted or continued by the defendant against the plaintiff; (2) termination of the proceeding in favor of the plaintiff; (3) absence of probable cause for the proceeding; and (4) "malice" or a primary purpose other than that of bringing an offender to justice. *Greywolf v. Carroll*, 151 P.3d 1234, 1241 (Alaska 2007). If Mr. Bartlett did intend to assert a state law malicious prosecution claim, it would fail based on the Court's ruling, *supra*, that there was probable cause for his arrest.

[75] Docket 57 at 39-40.

[76] *Devereaux v. Abbey*, 263 F.3d 1070, 1075-76 (9th Cir. 2001).

investigating officers . . . from damages suffered thereafter because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time."[77] But a plaintiff may rebut this presumption by showing that the prosecuting attorney was "pressured or caused by the investigating officers to act contrary to his independent judgment."[78]

Mr. Bartlett maintains that he has rebutted the presumption of prosecutorial independence. He cites to *Newman v. County of Orange* for the proposition that the presumption of prosecutorial independence may be rebutted when a prosecutor "based the decision to prosecute solely on the information contained in the officers' report, but the plaintiffs highlighted striking omissions in those reports as well as the fact that the officers themselves offered conflicting stories."[79] Mr. Bartlett asserts that in his case, Mr. Beard prosecuted the case "solely on the charging documents and

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[77] *Harper v. City of Los Angeles*, 533 F.3d 1010, 1027 (9th Cir. 2008) (quoting *Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir. 1981), *overruled on other grounds by Beck v. City of Upland*, 527 F.3d 853, 865 (9th Cir. 2008)).

[78] *Harper*, 533 F. 3d at 1027. In *Harper*, evidence sufficient to rebut the presumption included: (1) the jury heard unrebutted testimony that the District Attorney worked "hand-in-hand" with the police including "ongoing daily interactions;" (2) there was "substantial evidence that the Task Force improperly exerted pressure on the District Attorney's office and failed to turn over evidence; and (3) the police "hounded" prosecutors to file charges and "intentionally hampered the investigation." *Id.* at 1027-28.

[79] Docket 57 at 39. *See Newman v. Cty. of Orange*, 457 F.3d 991, 994 (9th Cir. 2006).

submitted evidence" from Defendants, which "grossly mischaracterized" the incident.[80] He asserts that the video corroborates his version of events. Mr. Bartlett also asserts that Trooper Nieves "deliberately withheld his knowledge of the video footage because it directly contradicted his version of the altercation."[81]

Defendants cite to Ninth Circuit precedent holding that even in a case in which evidence has been fabricated, such evidence cannot form the basis of a malicious prosecution claim if that evidence only "had the potential to, but did not, impinge on plaintiffs' constitutionally protected rights" and independent reasons supported a finding of probable cause.[82] And in this case, the attorney testified that "[t]o my knowledge the troopers involved in Bartlett's arrest did not withhold any material information from me. The KTVA video confirmed the troopers' versions of the contact with Bartlett, which was further solidified by the enhanced video I obtained."[83]

Here, there is simply no evidence that the troopers pressured the prosecuting attorney or caused him to

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[80] Docket 57 at 39-40.

[81] Docket 57 at 41.

[82] Docket 62 at 18. *See Hennick v. Bowling*, 115 F. Supp. 2d 1204, 1208-09 (W.D. Wash 2000) (citing *Tomer v. Gates*, 811 F.2d 1240, 1242 (9th Cir. 1987)) ("where the fabricated evidence did not result in a deprivation of a liberty or property interest, there having been independent reasons to find probable cause for plaintiff's arrest, plaintiff failed to identify the required violation of a constitutional right").

[83] Docket 47-11 (Aff. of Beard) at 6.

act contrary to his own independent judgment. To the contrary, the evidence shows that the attorney conducted his own investigation when he independently sought out the videotape. Moreover, the evidence is undisputed that when the prosecuting attorney independently sought out the possible existence of media video footage, Trooper Nieves promptly suggested a possible source. In sum, Mr. Bartlett has presented only a speculative theory that the troopers manipulated the prosecuting attorney, which the attorney himself refutes.[84] This is not enough to sustain a malicious prosecution claim on a theory of fabricated evidence or rebut the presumption of prosecutorial independence. And if Mr. Bartlett is maintaining that the investigation conducted by the troopers was inadequate, § 1983 does not provide a remedy because an inadequate investigation does not violate federal constitutional or statutory law.[85] Defendants are entitled to summary judgment on Mr. Bartlett's malicious prosecution claim.

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[84] Docket 62-8 (Transcript of Beard Deposition) at 51.

[85] *See Gomez v. Whitney*, 757 F.2d 1005, 1006 (9th Cir. 1985) ("[W]e can find no instance where the courts have recognized inadequate investigation as sufficient to state a civil rights claim unless there was another recognized constitutional right involved."); *Hageman v. Bates*, No. CV-06-09 MDWM, CV-06-45 MDWM, 2007 WL 927584, at *1 (D. Mont. Mar. 23, 2007) ("Even if Plaintiffs could establish that the investigation conducted by law enforcement officers was inadequate, § 1983 does not provide a remedy because an inadequate investigation does not violate federal constitutional or statutory law.").

VI. Excessive Force

Mr. Bartlett alleges that Defendants used constitutionally excessive force against him when he was shoved, tackled to the ground, and handcuffed too tightly.

In *Graham v. Connor*, the Supreme Court held that in assessing the force used during an arrest, "the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake."[86] Factors to consider include the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. Reasonableness remains the touchstone, judged objectively from the "perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[87] "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment."[88] "The question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying

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[86] *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quotation marks and citations omitted); *see also C.V. by and through Villegas v. City of Anaheim*, ___ F.3d ____, No. 14-55760, 2016 WL 3007106, at *3 (9th Cir. May 25, 2016).

[87] *Id.*

[88] *Id.* (citation omitted).

intent or motivation."[89] And even if a court assumes a constitutional violation may have occurred, qualified immunity still applies unless it is clearly established that a reasonable officer would understand that the force in question was unlawful.[90]

Mr. Bartlett asserts that his case is similar to *Blankenhorn v. City of Orange*.[91] Mr. Blankenhorn was suspected of trespassing at a shopping mall from which he had been banned. He asserted that when he attempted to yank himself out of an officer's grasp, the officer threatened him with mace. Other officers arrived on the scene and interpreted Blankenhorn's admittedly angry, loud, and profane conduct as threatening. A video of the scene showed Blankenhorn "gesture several times by raising his arms above his head and touching his chest."[92] Blankenhorn said, "I'm not going to my f***ing knees" and asserted that three officers immediately jumped on him. There were several seconds of struggle before the officers took Blankenhorn down, handcuffed him, and secured his wrists and ankles. Blankenhorn maintained that during the struggle one of the officers punched him several times and his face was pressed to the ground by a knee behind his neck. A video confirmed that an officer had

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[89] *Id.* at 397.

[90] *Id.*

[91] Docket 57 at 33; *Blankenhorn v. City of Orange*, 485 F.3d 463 (9th Cir. 2007).

[92] *Blankenhorn*, 485 F.3d at 469.

punched Blankenhorn after he was already on the ground.[93]

The Ninth Circuit identified several material factual disputes, including whether Blankenhorn had identified himself as a gang member and had resisted being handcuffed. Accordingly, the Court held that "[w]here such disputes exist, summary judgment is appropriate only if Defendants are entitled to qualified immunity on the facts as alleged by the non-moving party."[94] The *Blankenhorn* Court then turned to whether the rights at issue were clearly established such that qualified immunity should apply. Applying a "fair notice" standard, the *Blankenhorn* Court held that the "state of the law was 'clearly established' at the time of Blankenhorn's arrest and gave the arresting officers sufficiently fair notice that their conduct could have been unconstitutional."[96] The Ninth Circuit also held that an individual "has the limited right to offer reasonable resistance to an arrest that is the

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[93] *Blankenhorn*, 485 F.3d at 469-70.

[94] *Blankenhorn*, 485 F.3d at 477.

[96] *Blankenhorn*, 485 F.3d at 481 (formatting and quotation marks omitted). The Ninth Circuit's use of the phrase "could have been unconstitutional" in *Blankenhorn* may not be in conformance with current Supreme Court precedent. In *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011), a decision issued four years after *Blankenhorn*, the Supreme Court explained that "[w]e do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate"; *see also Mullenix*, 136 S. Ct. at 308 (excessive force); *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (speech-related retaliatory arrest).

product of an officer's personal frolic. . . . triggered . . . by the officer's bad faith or provocative conduct."[96]

Plaintiff asserts that like Mr. Blankenhorn, Mr. Bartlett was charged with misdemeanors and did not pose a threat to officers or others.[97] He asserts that "[t]o the extent Bartlett did resist the assault from Weight and Nieves, a reasonable jury could find that their conduct was provocative because it came without warning, and no attempt was made to handcuff Bartlett before taking him roughly to the ground."[98] Mr. Bartlett asserts that "a reasonable jury could find that Weight and Nieves used constitutionally unacceptable force under the circumstances" and that "[t]he constitutional right not to be gang-tackled by police officers without warning was clearly established at the time Bartlett was arrested [such that] neither [Weight nor Nieves] could have reasonably believed their shove and concerted takedown of Bartlett was lawful."[99]

With regard to the shove by Trooper Weight, Defendants cite *Jackson v. City of Bremerton*, in which the Ninth Circuit found no Fourth Amendment violation where a woman "ran to interfere" with police officers

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[96] *Blankenhorn*, 485 F.3d at 479 (quoting *United States v. Span*, 970 F.2d 573, 580 (9th Cir. 1992)). *But see Graham*, 490 U.S. at 397 (holding that reasonableness inquiry in an excessive force case is objective, without regard to the officers' underlying intent or motivation).

[97] Docket 57 at 35.

[98] *Id.*

[99] Docket 57 at 36.

attempting to control a "melee" at a park.[100] An officer sprayed the woman with a chemical irritant, arrested her for failure to leave, allegedly pushed her part way to the ground, placed his knee on her back, handcuffed her, and locked her in a closed vehicle in 90 degree weather. The woman contended that the handcuffing resulted in permanent damage to a finger. The Circuit Court affirmed the district court's grant of summary judgment in favor of the officers because "no Fourth Amendment violation occurred."[101] The appellate court held that "the nature and quality of the alleged intrusions [by the officers] were minimal" and the woman's "interference posed an immediate threat to the officers' personal safety and ability to control the group."[102]

Defendants contend that Mr. Bartlett's conduct was similar to the woman's conduct in *Jackson*, such that Trooper Weight's contact "is exactly the type of 'push or shove' that does not violate the Fourth Amendment."[103] Defendants also assert that Mr. Bartlett has failed "to cite even a single case that holds that a police

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[100] 268 F.3d 646, 650 (9th Cir. 2001). Defendants also cite to *Scott v. Henrich*, 39 F. 3d 912, 915 (9th Cir. 1994), in which the Ninth Circuit held that "[o]fficers . . . need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable." Defendants assert that "[b]ecause Bartlett was so close to Trooper Weight, the trooper could not timely react if Bartlett assaulted him." Docket 47 at 28.

[101] *Jackson*, 268 F.3d at 653.

[102] *Id.* at 652-53.

[103] Docket 47 at 29.

officer's open-palmed push violates the constitution."[104]

With regard to the takedown, Defendants assert it "was well within constitutional bounds."[105] Defendants maintain that the facts of this case are dissimilar to *Blankenhorn* because Troopers Weight and Nieves did not "gang-tackle" Mr. Bartlett, punch him, or place a knee on his neck. Rather, Defendants assert that the troopers executed a "controlled takedown (i.e., a takedown executed so as to produce only minimal injury)."[106] And Defendants maintain that Mr. Bartlett's "lack of injury signals that the force used was reasonable."[107] Defendants also cite *Jackson v. City of Bremerton* for the proposition that even if a constitutional violation occurred, "qualified immunity is appropriate for tense circumstances in which officers must make on-the-spot judgment calls."[108]

With regard to Mr. Bartlett's tight handcuff claim, Defendants cite *Hupp v. City of Walnut Creek*, in which a district court summarized Ninth Circuit precedent

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[104] Docket 62 at 14.

[105] Docket 62 at 16.

[106] Docket 47 at 33.

[107] Docket 47 at 35. *See, e.g.*, *Crumley v. City of St. Paul*, 324 F.3d 1003, 1007 (8th Cir. 2003) (de minimis use of force or injury is insufficient to support a finding of a constitutional violation).

[108] Docket 47 at 34. *See Jackson*, 268 F.3d at 652 (citing *Graham*, 490 U.S. at 396-97) ("[T]he court's consideration of 'reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.'").

on such claims to conclude that absent "a physical manifestation of injury or of a complaint about tight handcuffs that was ignored," the officers in that case were entitled to summary judgment on a similar claim.[109]

The Court finds here, when considering the first *Graham* factor – the severity of the crime at issue – Mr. Bartlett's potential crime appears in hindsight to be de minimis. But under the second factor – whether the suspect poses an immediate threat to the safety of the officer or others – in light of the circumstances presented at an event like Arctic Man at 1:30 in the morning and Mr. Bartlett's alleged interference with an investigation, no reasonable jury could find that Trooper Weight acted unreasonably when he sought to increase the distance between himself and Mr. Bartlett, and shoved Mr. Bartlett in a way that did nothing more than that: Mr. Bartlett did not fall down and was not injured. Likewise, with respect to the tackle and takedown, and viewing the facts in the light most favorable to Mr. Bartlett, no reasonable jury could

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[109] 389 F. Supp. 2d 1229, 1232-33 (N.D. Cal. 2005).

In cases where the Ninth Circuit has held that excessively tight handcuffing can constitute a Fourth Amendment violation, plaintiffs either were demonstrably injured by the handcuffs or their complaints about the handcuffs being too tight were ignored by the officers. *See e.g.*, *Wall v. County of Orange*, 364 F.3d 1107, 1109-12 (9th Cir. 2004) (doctor testified arrestee suffered nerve damage); *LaLonde v. County of Riverside*, 204 F.3d 947, 952, 960 (9th Cir. 2000) (arrestee complained to officer who refused to loosen handcuffs); *Palmer v. Sanderson*, 9 F.3d 1433, 1434-36 (9th Cir. 1993) (arrestee's wrists were discolored and officer ignored his complaint).

conclude the amount of force used was constitutionally excessive. As to the handcuffs, Mr. Bartlett's testimony was that they were immediately loosened when he brought his discomfort to someone's attention without any need for medical treatment. Given the controlling case law, the facts as Mr. Bartlett recounts them are insufficient to raise a genuine issue of fact such that no reasonable jury could conclude that an unconstitutionally excessive use of force occurred.

Moreover, even if the Court assumes a constitutional violation occurred, Defendants have cited to a number of cases in which more force was applied without a constitutional violation, which Mr. Bartlett has not responded with other existing precedent that puts the constitutionality of the amount of force used in his case beyond debate.[110] Accordingly, it is not clearly established that in the context of a crowded event like Arctic Man, at 1:30 a.m., an officer may not increase the distance between the officer and one who challenges the officer's authority with a shove, or that an officer may not force an arrestee to the ground using an amount of force that causes no injury. Accordingly, Defendants are entitled to qualified immunity on Mr. Bartlett's excessive force claims.

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[110] *See al-Kidd*, 563 U.S. at 741 ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."); *see also Mullenix*, 136 S. Ct. at 308 (same in excessive force context); *Reichle*, 132 S. Ct. at 2093 (same in speech-related retaliatory arrest context).

VII. First Amendment

Criticism of the police is not a crime, and even obscene gestures and words directed towards police officers, without more, will not support probable cause to arrest.[111] But the Supreme Court has observed that "[t]his court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause."[112]

Mr. Bartlett's First Amendment claim arises from his belief that his arrest was "motivated purely by a desire to retaliate against a verbal challenge to an officer's authority."[113] Mr. Bartlett opines that Trooper Nieves "interpreted Bartlett's earlier refusal to speak with him as a challenge to his authority; that Nieves then rushed over to Bartlett in retaliatory anger; that Weight shoved Bartlett simply for speaking his mind; and that both men then assaulted Bartlett to vindicate what they perceived as a challenge to their authority, a taunt that they could not leave unpunished in front of several onlookers and a rolling video camera."[114] Mr. Bartlett asserts that after his arrest, Trooper Nieves

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[111] *See Duran v. City of Douglas, Ariz.*, 904 F.2d 1372, 1377-78 (9th Cir. 1990).

[112] *Reichle*, 132 S. Ct. at 2093. The Ninth Circuit has also recently confirmed that the "absence of probable cause must be pleaded and proven to support action against criminal investigators for inducing retaliatory prosecution." *Rodriguez v. City of Stockton*, ___ Fed. Appx. ____, No. 12-15676, 2016 WL 1085260, at *1 (9th Cir. Mar. 21, 2016).

[113] Docket 57 at 30 (quotation marks omitted).

[114] Docket 57 at 32.

told him, "Bet you wish you would have talked to me now."[115]

Defendants assert that the "[t]roopers arrested Bartlett based on his physical act of confronting Trooper Weight, interfering with an ongoing investigation, and for putting Trooper Weight in fear of assault."[116] Defendants cite *Arias v. Amador* in which a district court found that "when a person's words go 'beyond verbal criticism, into the realm of interference with [an officer's performance of his or her] duty,' the First Amendment does not preclude criminal punishment."[117]

Because the Court has found that the troopers had probable cause to arrest Mr. Bartlett for harassment, Mr. Bartlett has not met the requirements necessary to support his First Amendment claim. Construing all the facts in Mr. Bartlett's favor, even if Mr. Bartlett's speech motivated the troopers' actions, they still had probable cause to arrest Mr. Bartlett for the crime of harassment.[118] Accordingly, Mr. Bartlett may not maintain a First Amendment cause of action and the troopers are entitled to summary judgment on this claim.

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[115] Docket 57 at 32.

[116] Docket 47 at 22.

[117] 61 F. Supp. 3d 960, 972 (E.D. Cal. 2014) (brackets in original) (quoting *People v. Lacefield*, 157 Cal. App. 4th 249, 261 (Cal. App. 2007)).

[118] *See Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

VIII. Fourteenth Amendment

Mr. Bartlett's Fourteenth Amendment claim relates to the troopers' failure to collect and preserve the KTVA video footage.[119] The Ninth Circuit has held in a § 1983 action that an officers' failure to disclose exculpatory evidence may violate an arrestee's right to due process when it leads to the lengthy detention of an innocent person.[120] But here, there is no evidence that media footage was withheld or concealed from the prosecutor; the media footage has in fact been obtained; the media footage is not exculpatory as explained by the Court's rulings in this order; and Mr. Bartlett was not subjected to a lengthy detention. Accordingly, Defendants are entitled to summary judgment on Mr. Bartlett's Fourteenth Amendment claim.

IX. Conspiracy

Mr. Bartlett has asserted a conspiracy claim under 42 U.S.C. § 1985. He did not specify under which provision of § 1985 he intended to bring this claim, but he asserts that Defendants conspired to deprive him of "the due course of justice" with "intent to deny him equal protection of the law and/or injure him for attempting to protect the lawful/constitutional rights of another," which could constitute a claim under § 1985(2). The equal protection language of this provision, like that in § 1985(3), "require[s] an allegation of

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[119] Docket 57 at 44.

[120] *Tatum v. Moody*, 768 F.3d 806, 816 (9th Cir. 2014).

class-based animus," which has not been plead.[121] Also, "[t]he insufficiency of [the] allegations to support a section 1983 violation precludes a conspiracy claim predicated upon the same allegations."[122] For these reasons, summary judgment in favor of Defendants is warranted on Mr. Bartlett's conspiracy claim.

X. Conclusion

In light of the foregoing, IT IS ORDERED that Mr. Bartlett's Motion for Partial Summary Judgment at Docket 38 and his Motion for Summary Judgment Regarding Probable Cause at Docket 60 are DENIED as moot. Defendants' Motion for Summary Judgment at Docket 46 is GRANTED. This action is DISMISSED with prejudice. The Clerk of Court is directed to enter judgment for Defendants Luis A. Nieves and Bryce L. Weight. The trial and all associated pretrial deadlines are VACATED.

DATED this 7th day of July, 2016 at Anchorage, Alaska.

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[121] *Bretz v. Kelman*, 773 F.2d 1026, 1030 (9th Cir. 1985) (en banc).

[122] *Cassettari v. Nev. Cty., Cal.*, 824 F.2d 735 (9th Cir. 1987).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL P. BARTLETT, Plaintiff-Appellant, v. LUIS A. NIEVES, in his personal capacity; BRYCE L. WEIGHT, in his personal capacity, Defendants-Appellees.	No. 16-35631 D.C. No. 4:15-cv-00004-SLG District of Alaska, Fairbanks ORDER (Filed Nov. 21, 2017)

Before: WARDLAW, CLIFTON, and OWENS, Circuit Judges.

Appellant's Petition for Panel Rehearing (Docket No. 44) is DENIED.

No. 17-1174

In The
Supreme Court of the United States

LUIS A. NIEVES and BRYCE L. WEIGHT,

Petitioners,

v.

RUSSELL P. BARTLETT,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN SUPPORT

BARBARA L. SCHUHMANN
(Counsel of Record)
ZANE D. WILSON
EHREN D. LOHSE
CSG, INC.
714 Fourth Ave., Ste. 200
Fairbanks, Alaska 99701
(907) 452-1855
barbara@alaskalaw.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

When a plaintiff claims under 42 U.S.C. § 1983 that police officers retaliated against his First Amendment-protected expression by arresting him, does the existence of probable cause for the arrest operate as an absolute bar to his claim?

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INTRODUCTION

Russell Bartlett agrees with petitioners that the question presented by this case – whether probable cause defeats a First Amendment retaliatory-arrest claim under 42 U.S.C. § 1983 – is identical to the question that this Court will resolve in *Lozman v. City of Riviera Beach, Florida*, No. 17-21. He also agrees that the petition for certiorari in this case should be held for disposition in accordance with the Court's decision in the *Lozman* case. But unlike petitioners, Bartlett believes this case illustrates the danger in permitting *post hoc* probable cause to defeat a First Amendment retaliatory-arrest claim, for "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Houston v. Hill*, 482 U.S. 451, 462-63 (1987). Granting law enforcement the affirmative defense of *post hoc* probable cause against First Amendment retaliatory-arrest claims will undoubtedly deter the exercise of free speech in this country. *Ford v. City of Yakima*, 706 F.3d 1188, 1194 (9th Cir. 2013) ("[A] person of ordinary firmness would be chilled from future exercise of his First Amendment rights if he were booked and taken to jail in retaliation for his speech."). Bartlett presents his statement of the case with these considerations in mind. SUP. CT. R. 15.2.

STATEMENT OF THE CASE

In April 2014 Russell Bartlett attended Arctic Man – a multi-day, outdoor winter sporting event near Summit, Alaska – with his friend David Krack and Krack's teenage cousin, MacCoy Walker. C.A.E.R. 111, 160, 172. Before going to a party with his friends on the evening of April 12, Bartlett had dinner at his campsite and drank a few beers, but at no time was he highly intoxicated. C.A.E.R. 275.

After the three friends arrived at a campsite party, Alaska State Trooper Luis Nieves appeared to investigate underage drinking. C.A.E.R. 23-24. Nieves confronted Bartlett, tapping him on the shoulder and requesting to speak. C.A.E.R. 11, 194. When Bartlett replied "What for," Nieves's demeanor changed, and he told Bartlett in an aggressive tone: "You look like you're pretty interested in what's going on over there," referring to the underage drinking investigation. C.A.E.R. 194. Bartlett declined to speak to Nieves. C.A.E.R. 194; *See Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) ("[W]hen an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business." (citing *Florida v. Royer*, 460 U.S. 491, 498 (1983))). At that point Nieves contemplated arresting Bartlett for disorderly conduct but chose instead to not arrest him at that time. C.A.E.R. 227.

Some minutes later Bartlett observed another trooper, Bryce Weight, interrogating young Walker as Krack stood nearby. C.A.E.R. 165, 198-200. Bartlett,

believing Weight had no right to question Walker without a parent or guardian present, walked over to Weight and voiced this opinion. C.A.E.R. 11, 198-200. Although Bartlett expressed his opinion loudly, he did so to be heard over the party's blaring music, which forced everyone to stand close together and speak loudly if they wished to communicate effectively during the party. C.A.E.R. 117, 185, 249, 252.

What happens next was captured by reporter and cameraman John Thain, who had been filming Nieves all night to cover Arctic Man for a local television station. C.A.E.R. 27, 245-46. Enclosed within this opposition is a DVD containing two videos of the incident: one that has been slowed down in high resolution, C.A.E.R. 331-33; DVD Track 1, and one in normal time that is three minutes long and shows the incident between timeframes 2:02 and 2:37. C.A.E.R. 6-7; DVD Track 2.

The longer video captures Nieves approaching Weight and Bartlett; Walker, whose back is turned to the camera, stands in between Weight and Bartlett facing Krack, whose feet are visible. DVD Track 2, at 2:04. The edited video clearly shows Weight looking up and observing the arrival of Nieves and the video camera; Weight then turns to Bartlett, steps forward, and pushes him forcefully on the chest without warning.

Although Walker obscures Bartlett's right hand, Weight's right hand lands on Bartlett's chest before Bartlett's right arm flies back in reaction to the impending shove. C.A.E.R. 273-75; DVD Track 1, at 0:04-0:09. Nieves grasps Bartlett's left hand – seconds later,

Weight grabs Bartlett's right hand. Nieves repeatedly yells at Bartlett to "Back up," demanding that he get "on the ground." DVD Track 2, at 2:05-2:15. Weight then kicks at Bartlett's right leg, causing him to go to his knees. Bartlett shouts "Alright" in reaction to the demands while freeing his hands to avoid getting his face shoved into the snow. DVD Track 2, at 2:17. Bartlett hesitates slightly to lie prostrate because of an old back injury he wished not to re-aggravate. C.A.E.R. 273-75

Nieves then twice threatens Bartlett with a taser, and Bartlett immediately puts his hands behind his back. Throughout the attack, a crowd encircles Bartlett, illuminated by lights from Thain's video camera. Before the video of the attack ends, Walker and Krack can be seen observing Bartlett lying prostrate in the snow. The troopers' sudden and violent assault of Bartlett, who had only expressed his opinion, quickened young Walker's pulse and caused him to shake. C.A.E.R. 187.

In the next scene Nieves tells Bartlett, "Now you're going to jail," to which Bartlett responds, "For what?" DVD Track 2, at 2:24-2:34. Although the edited video does not capture it, between that conversation and when Nieves shuts the police car door on Bartlett, Nieves tells Bartlett, "[B]et you wish you would have talked to me now" in reference to their earlier encounter at the campsite party. C.A.E.R. 206; App. 6, 36-37.

The State of Alaska charged Bartlett with disorderly conduct and resisting arrest, App. 12-13, C.A.E.R. 10-11, and not with "harassment" as petitioners assert. Pet. for Cert., at 2. The State dismissed these charges against Bartlett nearly a year after they were filed, C.A.E.R. 16-20, allegedly due to budgetary reasons. Pet. for Cert., at 4. Bartlett then sued Weight and Nieves alleging, *inter alia*, retaliatory arrest under 42 U.S.C. § 1983. App. 15. To establish retaliatory animus in opposition to the Troopers' summary judgment motion, Bartlett highlighted contradictions and inconsistencies between the Troopers' incident reports and the video of his arrest. C.A.E.R. 111-58.

Weight wrote in his incident report that Bartlett "stepped forward to where his chest was almost touching mine, and his face very close to mine," yet the video depicts the men standing at arm's length. C.A.E.R. 10. Weight wrote that after shoving Bartlett, Bartlett "came at me again," C.A.E.R. 10, yet the video does not show this. Weight later testified that his report was inaccurate as it reflected only his "belief" that Bartlett *would have* come at him again had Nieves not grabbed Bartlett's arm. C.A.E.R. 262-64. Weight wrote that Bartlett "continued to get in between me and the juvenile," C.A.E.R. 10, yet the video shows all three individuals standing equidistant from one another. Weight wrote that Bartlett "attempted to 'head-butt' Sgt. Nieves," C.A.E.R. 11, yet the video shows no such attempt.

Nieves wrote in his incident report that when he first encountered Bartlett at the campsite party, "Bartlett began to shout to . . . the occupants of the RV that they did not have to speak with me or allow me in the RV." C.A.E.R. 11. But three witnesses, including the RV's owner, corroborated Bartlett's assertion that he never told the RV's occupants not to speak with Nieves. C.A.E.R. 196-97, 234-39, 243-44. Nieves wrote that Bartlett "began to close [sic] Trooper Weight," C.A.E.R. 11, but the video instead shows Weight stepping toward Bartlett to shove him. Nieves wrote that he advised Bartlett twice that he was under arrest, C.A.E.R. 11, but the video establishes that he did not. Nieves wrote that Bartlett "swung his right fist toward me," C.A.E.R. 11, but again, the video does not corroborate this assertion.

Weight and Nieves later submitted sworn declarations to the district court that were tellingly silent on whether Bartlett "swung his right fist" or attempted to "head-butt" during the altercation. C.A.E.R. 68-70, 89-90. Nevertheless, the district court granted summary judgment to Weight and Nieves on Bartlett's retaliatory arrest claim. It found that probable cause existed to arrest Bartlett for the uncharged crime of harassment, App. 19-23; C.A.E.R. 14, 16, so his retaliatory arrest claim necessarily failed because this Court "has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause." App. 36 (quoting *Reichle v. Howards*, 566 U.S. 658, 664-65 (2012)).

Bartlett won his appeal to the Court of Appeals for the Ninth Circuit, allowing him a trial on his First-Amendment retaliatory arrest claim, because "an individual has a right to be free from retaliatory police action, even if probable cause existed for that action." App. 5 (quoting *Ford*, 706 F.3d at 1195-96). According to the Ninth Circuit:

> Most importantly, Bartlett alleged that Sergeant Nieves said "bet you wish you would have talked to me now" after his arrest. This statement, if true, could enable a reasonable jury to find that Sergeant Nieves arrested Bartlett in retaliation for his refusal to answer Sergeant Nieves's questions earlier in the evening. App. 6.

Bartlett's chance to hold the Troopers accountable for their retaliation against him for simply speaking his mind now hinges on this Court's decision in the *Lozman* case.

REASONS FOR GRANTING THE PETITION

Bartlett agrees with petitioners that "[b]ecause [their] petition seeks review of the same question presented in *Lozman*, the Court should grant the petition and hold it for disposition in accordance with the Court's decision in the *Lozman* case." Pet. Cert. 7. Luckily, Bartlett suffered no lasting injuries from the Troopers' attack on him, but he spent time and money

defending himself against their baseless criminal charges that were ultimately dismissed. C.A.E.R. 112, 20. This should not be the price a contrarian, protestor, or other concerned citizen pays for speaking her mind to law enforcement.

The Troopers now admit that "[b]ecause [Bartlett's] conduct did not amount to a major crime, [they] could have used their discretion not to arrest [him,]" and perhaps would have declined to arrest him had they known Bartlett would doggedly pursue a retaliatory-arrest claim against them. Brief for State of Alaska as Amicus Curiae in Support of Respondent, *Lozman v. City of Riviera Beach, Florida*, No. 17-21, at 16. The State's assertion crystalizes the issue: Without a rule of law permitting First-Amendment retaliatory arrest claims to be brought despite *post hoc* probable cause, law enforcement will have carte blanche to "exercise their authority for personal motives, particularly in response to real or perceived slights to their dignity," *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990), just as the Troopers did here. Current law in the Ninth Circuit must remain in force to deter Troopers like Weight and Nieves from making future unconstitutional retaliatory arrests. *See Ford*, 706 F.3d at 1195-96.

CONCLUSION

The petition filed in this case should be held pending this Court's decision in *Lozman v. City of Riviera*

Beach, Florida, No. 17-21, and disposed of in accordance with the Court's decision in that case.

Respectfully submitted,

BARBARA L. SCHUHMANN
(*Counsel of Record*)
ZANE D. WILSON
EHREN D. LOHSE
CSG, INC.
714 Fourth Ave., Ste. 200
Fairbanks, Alaska 99701
(907) 452-1855

No. 17-1174

In the Supreme Court of the United States

LUIS A. NIEVES AND BRYCE L. WEIGHT
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX Vol. I of II

JAHNA LINDEMUTH
Attorney General
STATE OF ALASKA
DARIO BORGHESAN
Counsel of Record
Assistant Attorney General
ANNA R. JAY
Assistant Attorney General
1031 W. Fourth Ave.
Suite 200
Anchorage, AK 99501
(907) 269-5100
dario.borghesan@alaska.gov

Counsel for Petitioner

BARBARA L. SCHUHMANN
Counsel of Record
ZANE D. WILSON
EHREN D. LOHSE
CSG, INC.
714 Fourth Ave.
Suite 200
Fairbanks, Alaska 99701
(907) 452-1855
barbara@alaskalaw.com

Counsel for Respondent

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Exhibit A: Declaration of Luis A. Nieves . JA 139

Attachment 1: Alaska Department of Public Safety Incident Report ..... JA 145

Attachment 2: Use of Force IA No: UOF2014-0069 ..... JA 154

Exhibit B: Affidavit of Lieutenant Lawrence Piscoya ..... JA 162

Exhibit C: Deposition Excerpts of Bryce L. Weight, dated (July 31, 2015 ..... JA 167

Exhibit D: Deposition Excerpts of Luis A. Nieves, dated July 31, 2015 ..... JA 184

Exhibit E: Deposition Excerpts of David Krack, dated July 27, 2015 ..... JA 198

Exhibit F: Deposition Excerpts of Russell Bartlett, dated July 27, 2015 ..... JA 210

Exhibit G: Declaration of Bryce L. Weight JA 223

Attachment 2: Use of force IA No: UOF201-0069 ..... JA 230

Exhibit J: Affidavit of Raymond Beard JA241

Reply to Response to Motion for Partial Summary Judgment filed by Russell P. Bartlett (February 4, 2016) ..... N/A

Exhibit A: Deposition Excerpts of Luis Nieves, dated July 31, 2015 ..... JA 247

Opposition to Motion for Summary Judgment (March 15, 2016) ..... JA 256

Exhibit A: Deposition Excerpts of David Krack, dated July 27, 2015 ..... JA 325

Exhibit B: Deposition Excerpts of MacCoy Walker, dated September 1, 2015 ..... JA 339

Exhibit C: Deposition Excerpts of Russell Bartlett, dated July 27, 2015 ..... JA 359

Exhibit D: Deposition Excerpts of Luis Nieves, dated July 31, 2015 ..... JA 378

Exhibit H: Deposition Excerpts of Jerry Sadler, Jr., dated August 10, 2015 ..... JA 404

Exhibit I: Affidavit of Sierra Conento .... JA 410

Exhibit K: Deposition Excerpts of Brice Weight, dated July 31, 2015 ..... JA 412

Exhibit L: Affidavit of Russell Bartlett ... JA 429

Exhibit M: Deposition Excerpts of Lawrence Piscoya, dated February 24, 2016 ..... JA 432

Exhibit O: [SEALED] DPS Operating Procedures Manual - Non-custodial Interviews & Use of Force [*See Volume II*] ..... JA 535

Exhibit R: Correspondence between CSG, Inc. and State of Alaska ..... JA 444

Reply to Opposition to Motion for Summary Judgment (March 31, 2016) ..... JA 464

Exhibit S: Affidavit of Melody S. Misulich JA 492

Exhibit V: Transcript Excerpt, dated February 23, 2016 ..... JA 501

Exhibit Y: Deposition Excerpts of Russell Bartlett, dated July 27, 2015 ..... JA 523

Exhibit AA: Affidavit of Russell P. Bartlett JA 528

Petition for Panel Rehearing in the United States District Court of Appeals for the Ninth Circuit (November 3, 2017) ..... JA 531

The following parts of the record have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

Memorandum, United States Court of Appeals for the Ninth Circuit (October 20, 2017) ..... App. 1

Order, United States District Court, Alaska (July 7, 2016) ..... App. 7

Order, United States Court of Appeals for the Ninth Circuit (November 21, 2017) ..... App. 40

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA (FAIRBANKS)

4:15-cv-00004-SLG

Bartlett v. Nieves, et al.

Date Filed	#	Docket Text
03/02/2015	1	COMPLAINT against Luis A. Nieves, Bryce L. Weight (Filing fee $400/receipt #FBK001125.), filed by Russell P. Bartlett.(PXS, COURT STAFF) (Entered: 03/03/2015)
* * *		
03/10/2015	7	NOTICE *to Court of Filing Exhibits to Complaint* by Russell P. Bartlett re 1 Complaint (Attachments: # 1 Exhibit B, # 2 Exhibit C, # 3 Exhibit D)(Wilson, Zane) (Entered: 03/10/2015)
* * *		
05/04/2015	9	ANSWER to 1 Complaint with Jury Demand by Luis A. Nieves, Bryce L. Weight.(Moore, Stephanie) Modified on 5/6/2015 to reflect error: See 5/6/2015 Docket Annotation. (BJK, COURT STAFF). (Entered: 05/04/2015)
* * *		

10/16/2015	29	AMENDED COMPLAINT against All Defendants, filed by Russell P. Bartlett.(Wilson, Zane) (Entered: 10/16/2015)
10/29/2015	30	ANSWER to 29 Amended Complaint by All Defendants.(Moore, Stephanie) (Entered: 10/29/2015)
		* * *
11/10/2015	32	RESPONSE in Opposition re 31 MOTION to Quash *Deposition of Uninvolved Witness* filed by Russell P. Bartlett. (Attachments: # 1 Exhibit A-F, # 2 Exhibit, # 3 Proposed Order)(Wilson, Zane) (Entered: 11/10/2015)
		* * *
01/05/2016	38	MOTION for Partial Summary Judgment by Russell P. Bartlett. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Proposed Order)(Wilson, Zane) Modified on 1/6/2016 to reflect error: See 1/5/2016 Docket Annotation. (BJK, COURT STAFF). (Entered: 01/05/2016)
01/05/2016	39	MEMORANDUM *IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT* by Russell P. Bartlett 38 MOTION for Partial Summary Judgment filed by Russell P. Bartlett. (Wilson, Zane) (Entered: 01/05/2016)

	* * *	
01/28/2016	44	RESPONSE in Opposition re 38 MOTION for Partial Summary Judgment filed by Luis A. Nieves, Bryce L. Weight. (Attachments: # 1 Supplement Table of Contents, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit, # 11 Exhibit, # 12 Exhibit, # 13 Exhibit)(Moore, Stephanie) (Entered: 01/28/2016)
	* * *	
01/29/2016	46	MOTION for Summary Judgment by Luis A. Nieves, Bryce L. Weight. (Attachments: # 1 Proposed Order)(Moore, Stephanie) (Entered: 01/29/2016)
01/29/2016	47	MEMORANDUM *in Support of Motion for Summary Judgment* by Luis A. Nieves, Bryce L. Weight 46 MOTION for Summary Judgment filed by Luis A. Nieves, Bryce L. Weight. (Attachments: # 1 Supplement, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit, # 11 Exhibit, # 12 Exhibit, # 13 Exhibit, # 14 Exhibit, # 15 Exhibit, # 16 Exhibit)(Moore, Stephanie) (Entered: 01/29/2016)

	* * *	
02/04/2016	49	REPLY to Response to Motion re 38 MOTION for Partial Summary Judgment filed by Russell P. Bartlett. (Attachments: # 1 Exhibit A)(Wilson, Zane) (Entered: 02/04/2016)
	* * *	
03/15/2016	57	RESPONSE in Opposition re 46 MOTION for Summary Judgment filed by Russell P. Bartlett. (Attachments: # 1 Appendix, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit, # 11 Exhibit, # 12 Exhibit, # 13 Exhibit, # 14 Exhibit, # 15 Exhibit, # 16 Exhibit, # 17 Exhibit, # 18 Exhibit, # 19 Exhibit, # 20 Exhibit, # 21 Proposed Order)(Wilson, Zane) (Entered: 03/15/2016)
	* * *	
03/18/2016	60	MOTION for Summary Judgment *REGARDING THERE BEING NO PROBABLE CAUSE TO CHARGE MR. BARTLETT WITH RESISTING ARREST* by Russell P. Bartlett. (Attachments: # 1 Proposed Order)(Wilson, Zane) (Entered: 03/18/2016)

	* * *	
03/31/2016	62	REPLY to Response to Motion re 46 MOTION for Summary Judgment filed by Luis A. Nieves, Bryce L. Weight. (Attachments: # 1 Supplement, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit, # 11 Exhibit, # 12 Exhibit, # 13 Exhibit, # 14 Exhibit, # 15 Exhibit)(Moore, Stephanie) (Entered: 03/31/2016)
	* * *	
04/08/2016	65	RESPONSE in Opposition re 60 MOTION for Summary Judgment *REGARDING THERE BEING NO PROBABLE CAUSE TO CHARGE MR. BARTLETT WITH RESISTING ARREST* filed by Luis A. Nieves, Bryce L. Weight. (Moore, Stephanie) (Entered: 04/08/2016)
	* * *	
04/15/2016	67	REPLY to Response to Motion re 60 MOTION for Summary Judgment *REGARDING THERE BEING NO PROBABLE CAUSE TO CHARGE MR. BARTLETT WITH RESISTING ARREST* filed by Russell P. Bartlett. (Wilson, Zane) (Entered: 04/15/2016)

	* * *	
07/07/2016	73	**ORDER:** re All Pending Motions: 38 Motion for Partial Summary Judgment; 46 Motion for Summary Judgment; and 60 Motion for Summary Judgment. Signed by Judge Sharon L. Gleason on 07/07/2016. (AEM, CHAMBERS STAFF) (Entered: 07/07/2016)
07/13/2016	74	**JUDGMENT** in favor of Luis A. Nieves, Bryce L. Weight, against Russell P. Bartlett; Defendants, Luis A. Nieves and Bryce L. Weight to recover costs from plaintiff, Russell P. Bartlett. Signed by Judge Sharon L. Gleason on 7/13/2016. (SDW, COURT STAFF) (Additional attachment(s) added on 8/5/2016: # 1 Judgment with costs added. NEF Redistibuted.) (CME, COURT STAFF). (Entered: 07/13/2016)
	* * *	
08/05/2016	81	NOTICE OF APPEAL by Russell P. Bartlett. Filing fee $ 505. (Attachments: # 1 Exhibit)(Wilson, Zane) (Entered: 08/05/2016)
	* * *	

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

16-35631

Russell Bartlett v. Luis Nieves, et al.

Date Filed	#	Docket Text
		* * *
11/14/2016	7	Submitted (ECF) Opening Brief for review. Submitted by Appellant Russell P. Bartlett. Date of service: 11/14/2016. [10195414] [16-35631] (Wilson, Zane) [Entered: 11/14/2016 12:47 PM]
11/14/2016	8	Submitted (ECF) excerpts of record. Submitted by Appellant Russell P. Bartlett. Date of service: 11/14/2016. [10195426] [16-35631] (Wilson, Zane) [Entered: 11/14/2016 12:53 PM]
		* * *
02/02/2017	22	Submitted (ECF) Answering Brief for review. Submitted by Appellees Luis A. Nieves and Bryce L. Weight. Date of service: 02/02/2017. [10300685] [16-35631]--[COURT UPDATE: Attached corrected brief. 02/08/2017 by SLM] (Botstein, Ruth) [Entered: 02/02/2017 07:02 PM]

02/02/2017	23	Submitted (ECF) supplemental excerpts of record. Submitted by Appellees Luis A. Nieves and Bryce L. Weight. Date of service: 02/02/2017. [10300686] [16-35631] (Botstein, Ruth) [Entered: 02/02/2017 07:03 PM]
* * *		
02/16/2017	30	Submitted (ECF) Reply Brief for review. Submitted by Appellant Russell P. Bartlett. Date of service: 02/16/2017. [10323234] [16-35631]--[COURT UPDATE: Attached corrected brief. 02/22/2017 by SLM] (Wilson, Zane) [Entered: 02/16/2017 03:35 PM]
* * *		
10/06/2017	41	ARGUED AND SUBMITTED TO KIM MCLANE WARDLAW, RICHARD R. CLIFTON and JOHN B. OWENS. [10608910] (SB) [Entered: 10/06/2017 10:20 AM]
10/06/2017	42	Filed Audio recording of oral argument. **Note:** Video recordings of public argument calendars are available on the Court's website, at http://www.ca9.uscourts.gov/media/ [10610045] (SB) [Entered: 10/06/2017 04:53 PM]

10/20/2017	43	FILED MEMORANDUM DISPOSITION (KIM MCLANE WARDLAW, RICHARD R. CLIFTON and JOHN B. OWENS) Each party to bear its own costs. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. FILED AND ENTERED JUDGMENT. [10625157] (MM) [Entered: 10/20/2017 09:41 AM]
11/03/2017	44	Filed (ECF) Appellant Russell P. Bartlett petition for panel rehearing (from 10/20/2017 memorandum). Date of service: 11/03/2017. [10643609] [16-35631] (Wilson, Zane) [Entered: 11/03/2017 04:56 PM]
11/21/2017	45	Filed order (KIM MCLANE WARDLAW, RICHARD R. CLIFTON and JOHN B. OWENS): Appellant's Petition for Panel Rehearing (Docket No. [44]) is DENIED. [10663608] (AF) [Entered: 11/21/2017 03:58 PM]
* * *		

Exhibit B

Alaska Department of Public Safety

Incident Report

[SEAL]

Incident: AK14025280

Incident Type:

Disorderly Conduct [90C]

Incident time:

04/13/2014 01:57 - 04/13/2014 02:42

Reported time:

04/13/2014 01:57

Incident location:

210 RICHARDSON HIGHWAY, PAXSON, Unorganized Borough AK USA 99737 (Beat/zone: HHHH)

Incident status:

Closed by arrest

Summary:

On 4/13/14 at approximately 0150 hours, Alaska State Troopers contacted a large party in the Artic Man event area to investigate minor consuming alcohol. At approximately 0157 hours Russell P. Bartlett attempted to stop Troopers from investigating and created a hazardous

condition. When being placed under arrest for disorderly conduct Russell resisted with force. Russell was charged with DC and resisting arrest.

Incident Activities/Offenses

- Disorderly Conduct - AS11.61.110(a)(6) - Recklessly Creates Hazardous Condition For Others with No Legal Justification or Excuse
- Resisting Arrest - AS11.56.700(a)(3) - Knowingly Resists Arrest by Any Means that Creates a Substantial Risk of Physical Injury to Any Person

Involved Persons

SADLER, JERRY LEE

Classification: Interview; Owner

SID: [redacted]

Gender: Male

Height: 6'2"

Race: White

DL: [redacted]

DOB: [redacted]

Weight: 190lb

Hair Color: Brown

Build:

Eye Color: Blue

Address: [redacted], Fairbanks North Star Borough AK USA 99709 (Beat/zone: UJBA)

E-mail:

BARTLETT, RUSSELL PAUL

Classification: Arrested; Charged

SID: AK6250956

Gender: Male

Height: 5'9"

Race: White

DL: 6250956 AK

DOB: [redacted]/1969

Weight: 235lb

Hair Color: Brown

Build:

Eye Color: Green

Address: 4040 OLD WOOD ROAD, ESTER, Fairbanks North Star Borough AK USA 99709 (Beat/zone: HJBF)

E-mail:

Telephone: (Cellular phone) (907) 347-1421

Involved Addresses

- 210 RICHARDSON HIGHWAY / Incident location / PAXSON, Alaska, USA 99737 (Beat/zone: HHHH)

Related Incidents

- Same event / AK14017152 / Miscellaneous / 03/11/2014 15:57

Involved Officers

- Assisting officer / #WSK0KIRKSEY, WALLACE S / Assisting officer
- Assisting officer / #RLM2MAU, RYAN L / Assisting officer
- Assisting unit / #GLR0RICH, GABRIEL L / Assisting unit
- Assisting officer / #NCH0HAYES, NICOLAS C / Assisting officer
- Assisting officer / #PND0DUCE, P NATHAN / Assisting officer
- Assisting officer / #JLC0CARSON, JESSIE L / Assisting officer
- Assisting officer / #GDY0YOUNG, GORDON D / Assisting officer
- Reporting unit / #PALTAST PALMER BHP / Reporting unit
- Assisting officer / #JDP2PUGH, JASON D / Assisting officer
- Assisting officer / #LAN1NIEVES, LUIS A / Assisting officer

- Reporting officer / #BLW1WEIGHT, BRYCE L / Reporting officer
- Call taker / #OPSFAST FAIRBANKS DISPATCH / Call taker

Reports

Arrest report

Subject:

BARTLETT, RUSSELL PAUL / Arrested; Charged / DOB: [redacted]/1969 (44) Gender: Male (4040 OLD WOOD ROAD, ESTER, Fairbanks North Star Borough AK USA 99709 (Beat/zone: HJBF)) DL:AK:6250956

Author:

#BLW1 WEIGHT, B.

Report time:

04/13/2014 01:57

Charges:

(1) AS11.61.110(a)(6) Recklessly Creates Hazardous Condition For Others with No Legal Justification or Excuse (Not Applicable)

(2) AS11.56.700(a)(3) Knowingly Resists Arrest by Any Means that Creates a Substantial Risk of Physical Injury to Any Person (Not Applicable)

General report

Author: #BLW1 WEIGHT, B.

Report time: 04/13/2014 04:16

Narrative:

On 4/13/14 at approximately 0125 hours I contacted a large party at the Artic Man event. From the patrol vehicle I observed several people in the area who appeared to be minors. I also observed the majority of the people at the party had alcoholic drinks in their hands. I contacted the party to investigate minors consuming alcohol. As I approached, several people departed the area.

I contacted 3 male juveniles who had been consuming alcohol. I referred them to Trp. Miner for issuance of minor consuming alcohol citations. I contacted a fourth male juvenile in the area and asked him to step to the side of the party so I could talk with him. The juvenile complied, and was very cooperative. As I was investigating, **Russell P. Bartlett AK6250956** approached me in an aggressive manner. He walked straight towards me and had a look of anger on his face. Russell put his arm between me and the juvenile and informed me that I could not speak with the juvenile. He told me that I had no business talking with the juvenile and I needed to leave him alone. I attempted to explain to Russell what I was doing and why I was speaking with the 16 year old (investigating minors consuming alcohol at the party). Russell continued to get in between me and the juvenile, and continued to be hostile and aggressive. I smelled the

strong odor of alcoholic beverage coming from Russell's breath and Russell was slurring his speech.

Russell stepped forward to where his chest was almost touching mine, and his face very close to mine. I took this action by Russell to be combative in nature. I placed both hands on Russell's chest and pushed him away from me. Russell came at me again. Sgt. Nieves and I attempted to gain control of Russell. Sgt. Nieves informed Russell he was under arrest and ordered Russell to the ground. Russell did not comply. I performed a leg sweep on Russell and Russell fell forward, catching himself with his hands. Russell continued to resist and struggle as Sgt. Nieves and I attempted to gain control of his arms and place him in hand cuffs. Russell attempted to 'head-butt' Sgt. Nieves, but was unsuccessful. Sgt. Nieves verbally threatened the use of a taser, and Russell went prone and placed his arms behind his back. Russell was placed into handcuffs. Russell was transported to the Artic Man holding tent on the charges of disorderly conduct and resisting arrest.

Per the Glennallen bail schedule, bail was set at $500.

Supplementary report

Author: #LAN1 NIEVES, L.

Report time:

Remarks:

Narrative:

On 4/13/14 at approximately 0135 hours, I arrived at a large party located at the end of the "runway" during

the Arctic Man event, to assist Trooper Miner and Trooper Weight with an investigation involving minors consuming alcohol. I contacted the owner of the camp site, Jerry Lee Sadler [redacted], in front of his RV. Also present was Russell P. Bartlett **AK6250956**. Bartlett began to shout to Sadler and the occupants of the RV that they did not have to speak with me or allow me in the RV. After speaking with Sadler, advising him to secure his alcohol from random juveniles showing up on his camp site, I spoke with Bartlett, offering to explain why Troopers were present. Bartlett advised me he did not want to speak with me and then told me to leave the camp site. I departed the campsite, but remained nearby to assist Trooper Miner and Trooper Weight with crowd control.

I observed Bartlett walking towards Trooper Weight, who was speaking with a juvenile near the campsite. Bartlett began to shout at Trooper Weight that he was not allowed to speak with the juvenile. Trooper Weight explained that he was conducting an investigation involving minors consuming alcohol. Bartlett got within an arm's length of Trooper Weight, shouting that he was not allowed to speak with the juvenile. Bartlett began to close Trooper Weight, resulting in Trooper Weight pushing him away. I immediately grabbed a hold of Bartlett and advised him he was under arrest for disorderly conduct. Bartlett clenched his right fist as I grabbed his left arm, shouting no. I advised him again that he was under arrest, as he pulled away from me, as he swung his right fist towards me. Trooper Weight assisted me in getting Bartlett into a prone position, as he continued to fight with us until Trooper Miner arrived and I threatened to deploy the Taser. Bartlett was subsequently

handcuffed and transported to the Arctic Man command post by Trooper Weight on the charges of Disorderly Conduct and Resisting Arrest. Sadler approached me in front of his camp site and asked who Bartlett was. Sadler stated that he did not know Bartlett and had not invited him to his camp site.

Printed: 04/25/2014 15:44 by BLW1

PSTD800P TERMID: X4QF

CRIMINAL CONVICTIONS 04/18/14 11:10:48.9

PERSON NAME: RUSSELL PAUL BARTLETT

UPDATED: AST NUM:

APSIN ID: 6250956

FBI NUM:

CRIMINAL HISTORIES MAY EXIST IN:

FP CLASS:

CONV COURT	CONV DATE	CONVICTING CHARGE
DFA	01/22/93	DWI - ALCOHOL

COURT DOCKET	POS FEL ID	ATN
M9203323	N	100208484

ARREST INFORMATION EXISTS FOR THE
PREVIOUS 120 DAYS
USE PFS TO VIEW

PF2 MULT PERSON PF8 FULL HIST *AT END*

Exhibit C

IN THE DISTRICT/SUPERIOR COURT FOR THE STATE OF ALASKA
AT Glennallen

COMPLAINT

Related to AST incident(s): AK14025280

CASE NO. 3GL-14-25-CR

[Filed April 14, 2014]

State of Alaska, Plaintiff, vs. Bartlett, Russell Paul Defendant 1 of 1.		
Date of Birth: [redacted]/1969	ASPIN: 6250956	
Operator License Number: 6250956 State: ☒ AK ☐ CDL? ☐ Yes ☒ No		
Mailing Address: PO BOX 408		
City: Ester	State: AK	ZIP: 99725

STATEMENT OF CHARGES:

Defendant(s)	ATN	CTN	Date Offense	Offense Location
Bartlett, Russell Paul	11257 6059	1	4/13/14	Arctic Man

Statute/Reg/ Ordinance (from UOCT)	Offense Title	Modifier
AS 11.61.110(a)	**DISORDERLY CONDUCT**	□ Attempt - AS 11.31.100 □ Solicitation - AS 11.31.110 □ Conspiracy - AS 11.31.120 □ Gang-Related - AS 12.55.137
Class A Misdemeanor		
DV Related: □ Yes ☒ No	□ Motor Vehicle Used in Commission of Offense - AS 28.15.181(a)	
If Traffic Offense: □ Highway Work Zone □ Traffic Safety Corridor Commercial Vehicle: □ Yes □ No If Yes, Type: □ >26,000 lbs. □ >15 passengers □ Hazardous Material		

THE COMPLAINANT STATES that on or about the 13th day of April, 2014, at or near Arctic Man, in the THIRD Judicial District, State of Alaska, the above named Defendant did unlawfully commit the offense of Disorderly Conduct, when

□ with intent to disturb the peace and privacy of another not physically on the same premises or with reckless disregard that his/her conduct had that effect after being informed that it was having that effect, he/she made unreasonably loud noise;

AS 11.61.110(a)(1)

☐ in a public or private place of another without consent, and with intent to disturb the peace and privacy of another or with reckless disregard that his/her conduct had that effect after being informed that was having that effect, he/she made unreasonably loud noise;

AS 11.61.110(a)(2)

☐ In a public place, when a crime had occurred, he/she refused to comply with a lawful order of a peace officer to disperse;

AS 11.61.110(a)(3)

☐ in a private place, he/she refused to comply with an order of a peace officer to leave premises in which he/she had neither a right of possession nor express invitation to remain of a person having a right of possession;

AS 11.61.110(a)(4)

☐ In a public or private place, he/she challenges another to fight or engage in fighting other than in self-defense;

AS 11.61.110(a)(5)

☒ he/she recklessly created a hazardous condition for others by an act which has no legal justification or excuse;

AS 11.61.110(a)(6)

☐ he/she intentionally exposed his/her buttock or anus to another with reckless disregard for the offensive or insulting effect the act may have on that person.

AS 11.61.110(a)(7)

VRA CERTIFICATION. I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

I certify under penalty of perjury that the foregoing is true.

4/13/2014
Date

/s/
Complainant's Signature

Trooper B. Weight
Type or Print Name and Title

#1 Criminal Complaint - 1 count - Perjury Cert. (10/13)
Criminal Rule 3

IN THE DISTRICT/SUPERIOR COURT FOR THE STATE OF ALASKA
AT Glennallen

COMPLAINT

Related to AST incident(s): AK14025280

CASE NO. 3GL-14-25-CR

[Filed April 14, 2014]

State of Alaska, Plaintiff, vs. Bartlett, Russell Paul Defendant 1 of 1.		
Date of Birth: [redacted]/1969	ASPIN: 6250956	
Operator License Number: 6250956 State: ☒ AK ☐ CDL? ☐ Yes ☒ No		
Mailing Address: PO BOX 408		
City: Ester	State: AK	ZIP: 99725

STATEMENT OF CHARGES:

Defendant(s)	ATN	CTN	Date Offense	Offense Location
Bartlett, Russell Paul	11257 6059	2	4/13/14	Arctic Man
Statute/Reg/ Ordinance (from UOCT)	Offense Title			Modifier

AS 11.56.700(a)	RESISTING OR INTERFERING WITH ARREST	☐ Attempt - AS 11.31.100 ☐ Solicitation - AS 11.31.110 ☐ Conspiracy - AS 11.31.120 ☐ Gang-Related - AS 12.55.137
Class A Misdemeanor		
DV Related: ☐ Yes ☒ No	☐ Motor Vehicle Used in Commission of Offense - AS 28.15.181(a)	
If Traffic Offense: ☐ Highway Work Zone ☐ Traffic Safety Corridor Commercial Vehicle: ☐ Yes ☐ No If Yes, Type: ☐ >26,000 lbs. ☐ >15 passengers ☐ Hazardous Material		

THE COMPLAINANT STATES that on or about the 13th day of April, 2014, at or near Arctic Man, in the THIRD Judicial District, State of Alaska, the above named Defendant did unlawfully commit the offense of Resisting or Interfering with Arrest, when he/she, knowing that a peace officer was making an arrest, with the intent of preventing the officer from making the arrest, he/she resisted personal arrest or interfered with the arrest of another by

☒ force; AS 11.56.700(a)(1)

☐ committing any degree of criminal mischief; AS 11.56.700(a)(2)

□ any means that created a substantial risk of physical injury to any person.

AS 11.56.700(a)(3)

Probable Cause Statement: See Affidavit.

VRA CERTIFICATION. I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

I certify under penalty of perjury that the foregoing is true.

4/13/2014
Date

/s/
Complainant's Signature

Trooper B. Weight
Type or Print Name and Title

#1 Criminal Complaint - 1 count - Perjury Cert. (10/13)
Criminal Rule 3

IN THE DISTRICT/SUPERIOR COURT FOR THE STATE OF ALASKA
AT Glennallen

AFFIDAVIT by Police Officer

In Support of Complaint

Related to AST incident(s): AK14025280

CASE NO. 3GL-14-25 CR

[Filed April 14, 2014]

State of Alaska, Plaintiff, vs. Bartlett, Russell Paul Defendant 1 of 1.		
Date of Birth: [redacted]/1969	ASPIN: 6250956	
Operator License Number: 6250956 State: ☒ AK ☐ CDL? ☐ Yes ☒ No		
Mailing Address: PO BOX 408		
City: Ester	State: AK	ZIP: 99725

Defendant(s)	ATN	CTN(s)	Date Offense	Offense Location
Bartlett, Russell Paul	11257 6059	1-2	4/13/14	Arctic Man

I, Trooper Bryce Weight attest to the following and state:

On 4/13/14 at approximately 0125 hours I contacted a large party at the Artic Man event. From the patrol vehicle I observed several people in the area who appeared to be minors. I also observed the majority of the people at the party had alcoholic drinks in their hands. I contacted the party to investigate minors consuming alcohol. As I approached, several people departed the area.

I contacted 3 male juveniles who had been consuming alcohol. I referred them to Trp. Miner for issuance of minor consuming alcohol citations. I contacted a fourth male juvenile in the area and asked him to step to the side of the party so I could talk with him. The juvenile complied, and was very cooperative. As I was investigating, **Russell P. Bartlett AK6250956** approached me in an aggressive manner. He walked straight towards me and had a look of anger on his face. Russell put his arm between me and the juvenile and informed me that I could not speak with the juvenile. He told me that I had no business talking with the juvenile and I needed to leave him alone. I attempted to explain to Russell what I was doing and why I was speaking with the 16 year old (investigating minors consuming alcohol at the party). Russell continued to get in between me and the juvenile, and continued to be hostile and aggressive. I smelled the strong odor of alcoholic beverage coming from Russell's breath and Russell was slurring his speech.

Russell stepped forward to where his chest was almost touching mine, and his face very close to mine. I took this action by Russell to be combative in nature. I

placed both hands on Russell's chest and pushed him away from me. Russell came at me again. Sgt. Nieves and I attempted to gain control of Russell. Sgt. Nieves informed Russell he was under arrest and ordered Russell to the ground. Russell did not comply. I performed a leg sweep on Russell and Russell fell forward, catching himself with his hands. Russell continued to resist and struggle as Sgt. Nieves and I attempted to gain control of his arms and place him in hand cuffs. Russell attempted to 'head-butt' Sgt. Nieves, but was unsuccessful. Sgt. Nieves verbally threatened the use of a taser, and Russell went prone and placed his arms behind his back. Russell was placed into handcuffs. Russell was transported to the Artic Man holding tent on the charges of disorderly conduct and resisting arrest.

VRA CERTIFICATION. I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of court proceeding and disclosure of the information was ordered by the court.

4/13/2014
Date

/s/
Complainant's Signature

Trp. B Weight
Type or Print Name and Title

Subscribed and sworn to or affirmed before me at Paxson, Alaska, on 4/13/14.

(SEAL) **/s/Heather Olalde**
Notary Public or other person authorized to administer oaths.
My commission expires: w/office

NVOL Criminal Complaint (10/2013)
Criminal Rule 3

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA AT FAIRBANKS

Case No. 4:15-cv-4 SLG

[Filed October 16, 2015]

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
v.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Defendants,	)

FIRST AMENDED COMPLAINT

Russell P. Bartlett (Bartlett) for his cause of action against the defendants hereby complains and alleges as follows:

I. GENERAL ALLEGATIONS

1. On March 13, 2014, Bartlett was attending the Arctic Man event, specifically a lawful gathering in the parking lot of said event.

2. Bartlett was accompanied by a minor who was attending and observing the event, but was not drinking any alcohol.

3. Bartlett observed the minor come into contact with Bryce L. Weight (Weight) who was acting in his official capacity as an Alaska State Trooper.

4. In a non-confrontational manner Bartlett advised Weight of his belief that Weight should not be interviewing the minor without the minor's lawful guardian present.

5. Without provocation and without cause Weight proceeded to assault Bartlett by shoving him in the chest and attacking and arresting him.

6. Luis A. Nieves (Nieves), also acting in his capacity as an Alaska State Trooper, also proceeded to assault and arrest Bartlett for no lawful reason.

7. The events related to Bartlett's arrest were witnessed and videotaped by a news crew[1] and the videotape of Bartlett's arrest was subsequently broadcast on the Anchorage news.

8. Nieves and Weight knew that they had no lawful basis to assault and arrest Bartlett so they drafted up a fabricated police report[2] falsely claiming that Bartlett had placed them in fear of an assault, claiming that Bartlett came at Weight after being shoved away from him, that Bartlett tried to head butt Nieves and swung his fist at Nieves.

9. The above allegations by Weight and Nieves are demonstrably false and inaccurate.

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[1] Exhibit A.

[2] Exhibit B.

10. The conduct of Nieves and Weight was and is in violation of standard trooper policy regarding when it is appropriate to initiate physical contact with an alleged defendant. Nieves and Weight further violated trooper policy by failing to audio record the events at issue and/or have destroyed the audio tape of the events.

11. Nieves and Weight knowingly and intentionally failed to gather and preserve the evidence documenting their encounter with Bartlett. Bartlett fortuitously and coincidentally discovered the video of his encounter with Nieves and Weight when it was posted on YouTube.

12. Weight and Nieves pressed false charges against Bartlett[3] and Bartlett incurred costs and attorney fees in defending against those false charges until the charges were finally dismissed by the District Attorney.[4]

13. The actions of the defendants as described above were not motivated by a purpose to serve the State but were willful, intentional, reckless, and/or made with gross negligence and malice against Bartlett and were initially motivated by an effort to "grand stand" before the TV audience.

14. As a result of the defendants actions Bartlett was incarcerated, searched, subjected to public ridicule, and had to defend himself against false charges, which

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[3] Exhibit C.

[4] Exhibit D.

charges were ultimately and belatedly dismissed by the District Attorney.

15. The actions of the defendants constitute a false arrest and imprisonment of Bartlett when the defendants knew or should have known that said arrest and incarceration was absolutely without merit.

16. The defendants intended and caused false criminal charges to be filed and pursued against Bartlett. Said charges have been dismissed because Bartlett was not guilty of the charges the defendants advanced against him.

17. The defendants intentionally assaulted Bartlett without cause or justification.

18. The defendants' actions were intended to and did in fact cause Bartlett to be subjected to false imprisonment.

19. The actions of the defendants were initially motivated by their desire to grandstand before the TV camera and to quash Bartlett's lawful exercise of his right of free speech. The actions of the defendants were intended to and did cause Bartlett to be cast in a false light, subjecting him to public disdain and ridicule.

20. The actions of the defendants were intentional and reckless to the rights of Bartlett. Further, the actions of the defendants were not intended or designed to in any way benefit their employer, the State of Alaska, and were malicious and corrupt supporting an award of punitive damages against the defendants.

COUNT I
VIOLATION OF 42 U.S.C. § 1983

21. Bartlett repeats all prior allegations as fully set forth herein.

22. No reasonable police officer would have believed that the acts undertaken by the defendants were appropriate under the facts of this case.

23. Acting under color of law, the defendants violated Bartlett's federal and state constitutional rights as referenced above to include his right to be free from unlawful assault by a police officer, to be free from a malicious criminal prosecution, to not be falsely incarcerated, unreasonable search and seizure, freedom of speech, equal protection of the law and his right to due process.

24. As a result of the defendants' actions, Bartlett has suffered damages to include – mental distress, damage to reputation, attorney fees, loss of freedom and violation of constitutional rights.

25. The defendants' actions violated 42 U.S.C § 1983

COUNT II
VIOLATION OF 42 U.S.C. § 1985

26. Bartlett repeats all prior allegations as fully set forth herein.

27. The defendants conspired to deprive Bartlett of the due course of justice with intent to deny him equal protection of the law and/or to injure him for attempting to protect the lawful/constitutional rights of another.

28. The defendants' actions violated 42 U.S.C § 1985.

WHEREFORE Bartlett prays for the following relief:

1. For judgment to enter against the defendants, in their personal capacity, in an amount reasonably believed to be in excess of $100,000 the precise amount to be proven at trial.

2. For an award of actual costs and attorney fees and interest to the fullest extent allowed under the law.

3. For such other and further relief as the court deems fair and equitable under the circumstances.

DATED this 30th day of July 2015.

/s/ Zane D. Wilson
714 Fourth Avenue, Suite 200
Fairbanks, Ak 99701
Phone: (907) 452-1855
Fax: (907) 452-8154
Email: zane@alaskalaw.com
Attorney Bar #9111108

* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. 4:15-cv-00004-SLG

[Filed October 29, 2015]

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
v.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Defendants,	)
	)

ANSWER TO FIRST AMENDED COMPLAINT

Defendants Luis Nieves and Bryce Weight answer Bartlett's First Amended Complaint as follows:

I. General Allegations

1. Defendants admit that Bartlett was attending the Arctic Man event but deny that the date was March 13, 2014. Defendants admit that on April 13, 2014, Bartlett was present at a large private party.

2. Defendants deny that Bartlett "was accompanied by a minor who was attending and observing the event" when he had initial contact with Sgt. Nieves and when he confronted Trooper Weight.

3. Defendants admit that Trooper Bryce Weight was acting in his official capacity as an Alaska State Trooper on April 13, 2014, at approximately 1:30 am, when Bartlett aggressively confronted Trooper Weight while he was speaking with a minor. Immediately before this, Bartlett had aggressively confronted Sgt. Nieves. Bartlett's aggressive behavior appeared to be escalating when he confronted Trooper Weight.

4. Defendants deny that Bartlett was non-confrontational. Bartlett aggressively interjected and interfered with a lawful investigation. Bartlett's hostile demeanor, actions, and demands could cause a reasonable law enforcement officer to fear an imminent assault. Bartlett had no apparent custodial authority or responsibility for the minor with whom Trooper Weight was speaking in the course of his investigation.

5. Denied.

6. Admitted that Trooper Weight was acting in his capacity as an Alaska State Trooper; denied that he had no lawful reasons for his actions.

7. Admitted that some events related to Bartlett's arrest were witnessed and videotaped by John Thain of Channel 11 News; denied that it was known at the time of Bartlett's arrest what Mr. Thain did or did not capture on video, nor would Mr. Thain have provided the video at the scene. The video was publicly available on the internet and was provided during the course of the criminal prosecution.

8. Denied.

9. Denied.

10. Denied.

11. Denied.

12. Denied.

13. Denied.

14. Denied.

15. Denied.

16. Denied.

17. Denied.

18. Denied.

19. Denied.

20. Denied.

Count I
Violation of 42 U.S.C. § 1983

21. Defendants restate their responses to paragraphs 1 through 20 of the Complaint.

22. Denied.

23. Denied.

24. Denied.

25. Denied.

Count II
Violation of 42 U.S.C. § 1985

26. Defendants restate their responses to paragraphs 1 – 25 of the Complaint.

27. Denied.

28. Denied.

In defense of plaintiff's claims, defendants state the following:

1. Plaintiff fails to state a claim upon which relief may be granted.

2. To the extent plaintiff is suing defendants in their official capacities for Section 1983 violations, this Court lacks jurisdiction for such claims.

3. Venue should be transferred to Anchorage.

4. Some or all of plaintiff's claims may be barred by the Separation of Powers Doctrine.

5. Defendants are absolutely immune for any acts or omissions; and if they are not absolutely immune, they have qualified immunity. All other immunities are reserved.

6. The criminal action against Bartlett was dismissed based solely on prosecutorial discretion and limited resources - - not because the criminal action lacked merit.

7. Investigation and protection of minors consuming alcohol are important public safety functions.

8. The video of this event demonstrates that plaintiff's claims are meritless and that plaintiff was engaged in disorderly and other unlawful conduct.

Defendants are entitled to attorney's fees and costs incurred in defending this action. Therefore,

defendants respectfully request that the Court dismiss the Complaint, enter judgment in their favor, and award them costs and fees and any other appropriate relief.

DATED: October 29, 2015.

CRAIG W. RICHARDS
ATTORNEY GENERAL

By: /s/Stephanie Galbraith Moore
Stephanie Galbraith Moore
Senior Assistant Attorney General
Alaska Bar No. 8911063
Department of Law
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-5190
Facsimile: (907) 258-0760
Email: stephanie.galbraith@alaska.gov
Attorney for Defendants

* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
AT FAIRBANKS

Case No. 4:15-cv-4 SLG

[Filed November 10, 2015]

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
v.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Defendants,	)

OPPOSITION TO MOTION TO QUASH DEPOSITION OF "UNINVOLVED WITNESS" (SGT. MIKE INGRAM)

I. INTRODUCTION

Russell Bartlett (Bartlett) has noticed the deposition of State Trooper Sgt. Mike Ingram (Ingram) to determine what policies, procedures or training he relied upon to support his seizure of a journalist's video of an individual being arrested. This information is relevant to Bartlett's case as Bartlett was video and audio taped by a journalist while he was being arrested but the officers involved in that arrest did not request

or obtain a warrant for the seizure of that evidence - even though one of the arresting officers, Trooper Nieves, participated in the gathering of the video/audio by wearing a wireless mic. Bartlett has attempted to obtain this evidence by questioning of Troopers Nieves and Weight, to no avail. To the extent Ingram relied upon training, policies, or procedures of the Alaska State Troopers to support his seizure, these policies, training or procedures would support Bartlett's argument that Troopers Nieves and Weight failed to seize his video (or even report that it existed) to conceal evidence in direct contradiction to the charges and police reports that were drafted by Troopers Nieves and Weight in this case. In sum, the requested deposition will provide a significant insight on why Troopers Nieves and Weight failed to obtain key evidence in Bartlett's criminal case it had been repeatedly requested by Bartlett and why this evidence was not produced until after key portions of the videotape were destroyed. To fully understand the relevance of Ingram's testimony a brief discussion of the facts is necessary.

II. FACTUAL BACKGROUND

As part of his activities at the 2014 Arctic Man, Trooper Nieves was put in contact with Mr. Thain, a KTVA reporter, who desired to film the trooper's activities at Arctic Man.[1] As part of this process Mr. Thain put a wireless mic on Trooper Nieves so that his filming would be coordinated with audio.[2] As part of

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[1] Deposition of Nieves, pg. 28.

[2] Deposition of Nieves, pg. 30.

the filming of the Arctic Man, Mr. Thain recorded an hour of video.[3] Neither Troopers Nieves nor Weight taped recorded their contact with and arrest of Bartlett.[4] Even though Trooper Nieves had been followed by Mr. Thain for several hours prior to events, Trooper Nieves claimed he had no idea that Mr. Thain was videotaping Bartlett's arrest.[5]

After Bartlett's case was initiated, Bartlett contacted the Assistant DA requesting discovery to include any audio or video of the case and informed the DA that he understood that somebody had videotaped his arrest.[6] On August 12, 2014m, the DA responded indicating that no such video existed and they were unaware of anyone tape recording Bartlett's arrest.[7] Troopers Nieves told his supervisor that there was no audio for the case.[8] It was not until December 1, 2014, that Trooper Nieves finally reported to the Assistant DA that the entire event had been audio and video taped by Mr. Thain.[9] Unfortunately, by the time the video was finally subpoenaed by the troopers (upon contact by Bartlett's counsel) not all of the video had

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[3] Deposition of Thain, pg. 10.

[4] Deposition of Nieves, pg. 31 and Weight, pg. 23.

[5] Deposition of Nieves, pgs. 30, 36.

[6] Exhibit A.

[7] Exhibit B.

[8] Exhibit C.

[9] Exhibit D.

been preserved, with only those portions that had actually aired being preserved.[10]

In reference to Ingram, all that counsel knows to date is the report in the Alaska Dispatch attached as Exhibit B to the State's motion to quash. The State argues that Ingram's seizure of video related to evidence of a shooting. But the Alaska Dispatch report says that the images simply contained pictures of the arrest of the alleged suspect, not pictures of any underlying events.[11] Regardless, according to the Alaska Dispatch Ingram claimed that the images of the arrest were evidence and as such needed to be seized. The basis of Ingram's beliefs in these positions is currently unknown.

As reflected in Exhibit C to the State's motion to quash, Bartlett has attempted, through other channels, to obtain evidence regarding the policies of the State of Alaska regarding the gathering of evidence at a crime scene. The State has responded by contending that there are no such policies or directives.[12] Furthermore, at his deposition, Trooper Nieves testified that, in his view, he was simply under no obligation to obtain evidence relative to a crime he is bringing against an individual.[13]

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[10] Deposition of Thain, pgs. 13-14.

[11] In Bartlett's case he was actually charged with resisting arrest and thus the video was direct evidence of the alleged crime.

[12] Exhibit C to Motion to Quash.

[13] Deposition of Nieves, pgs. 38-41.

The State's contention, at page 2 of the motion to quash, that Ingram is not an in either parties' witness lists or disclosures is simply inaccurate. Upon obtaining this information Bartlett promptly provided a supplemental disclosure relating to Ingram.[14] Final witness lists are due on December 7, 2015.[15]

III. ARGUMENT

Ingram's deposition is relevant to Bartlett's case.

The relevance of Ingram's testimony must be evaluated within the context of Bartlett's case. Fed. R. Civ. P. 26(b) provides: "parties may obtain discovery regarding any non-privileged matter that is relevant to any parties claim or defense..." and that "relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Indeed, there is a federal policy favoring broad discovery in civil rights actions in favor of full disclosure.[16]

Since 1988 it has been the law in the Ninth Circuit that a bad faith failure to collect potentially exculpatory evidence violates the due process clause.[17] Accordingly, why Troopers Nieves and Weight failed to request or otherwise obtain the full video of Bartlett's

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[14] Exhibit E.

[15] Scheduling and Planning Order (DE 14).

[16] *Jones v. Jennings*, 788 P.2d 732, 736 (Alaska 1990) citing *Inmates of Unit 14 v. Rebideau*, 102 F.R.D. 122, 128-29 (N.D.N.Y. 1984).

[17] *Miller v. Vasquez*, 868 F.2d 1116, 1120-21 (Ninth Circuit 1989).

arrest and surrounding events, prior to the majority of the video being destroyed, is a key issue in Bartlett's case, not only from the standpoint of a violation of due process but also to establish that Troopers Nieves and Weights actions were driven by the desire to conceal that they had brought false charges against Bartlett and had assaulted Bartlett to grandstand in front of the camera.

The State of Alaska has also held that under certain circumstances there is an affirmative duty to collect and preserve evidence that the police know is important to the defense of a charge.[18] In *Carter v. State*,[19] the court held that this duty does not apply if the defendant knows the evidence exists and understands the importance of it, the evidence is not ephemeral and the defendant has the same opportunity as the government to subpoena or otherwise obtain the evidence. In Bartlett's case, Bartlett had no idea who had filmed his arrest and tried to preserve that evidence by promptly requesting that information from the DA's office - which office provided inaccurate responses based upon the inaccurate responses they received Troopers Nieves and Weight. The evidence was ephemeral and was partially destroyed by the news reporter, who only saved those portions of the video that he ran on air. Lastly, because Bartlett did not know who had taken the video he could not obtain the video until he knew who filmed the video.

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[18] See *Klumb v. State*, 712 P.2d 909, 912 (Alaska App. 1986).

[19] Slip Opinion #2466 (Alaska August 7, 2015) attached hereto for the court's convenience as Exhibit F.

The jury is ultimately going to be required to determine why Troopers Nieves and Weight failed to obtain the audio and video of the events from Mr. Thain, even after they had failed to activate their own recorders. Bartlett will argue that Troopers Nieves and Weight deliberately failed to gather this evidence because the video demonstrated the falsity of the charges against Bartlett and the gross inaccuracy of both the charges and the police report submitted by Troopers Nieves and Weight. Troopers Nieves and Weight will contend that they were not motivated by such sinister objectives and that they simply did not request or obtain the video because there was no policy, procedure or training provided to Alaska State Troopers directing that they gather the video.

Bartlett fully expects that Ingram's deposition will provide evidence, from an Alaska State Trooper, regarding the training, policies and procedures of the Alaska State Troopers that motivated him to obtain an arrest video and that those policies, training and procedures will be very helpful to proving Bartlett's position regarding the motives of Troopers Nieves and Weight. Bartlett will then be able to take the policies, procedure and training identified by Ingram and provide that to his experts to provide expert testimony in the case. Bartlett has no intention of questioning Ingram on what should have happened in Bartlett's case. Rather, the questioning will focus on Ingram's knowledge of policies, procedures and training that Troopers Nieves and Weight contend does not exist but must exist to explain Ingram's actions under almost identical facts and circumstances. Given the misleading and inaccurate information provided by Troopers Nieves and Weight to date, Bartlett should not be left

to rely upon Troopers Nieves and Weight to accurately set forth trooper policy regarding the seizure of relevant evidence that is known to exist but is not obtained as part of the criminal prosecution. If Ingram testifies that there are no policies, training or procedures regarding the seizure of relevant evidence of criminal activity then this testimony will greatly benefit Troopers Nieves and Weight.

IV. CONCLUSION

Bartlett has noticed Ingram's deposition to obtain discovery regarding the policies, training and procedures of Alaska State Troopers on the gathering of evidence. These policies, training and procedures are directly relevant to proving why Troopers Nieves and Weight failed to obtain relevant evidence in this case until after that evidence had been partially destroyed and after Bartlett's defense had been trying to obtain that evidence for months. Bartlett should not be forced to rely upon Troopers Nieves and Weight regarding what policies, training and procedures are relevant to this case. The deposition will be minimally intrusive, relatively inexpensive and will take less time than the motion practice launched by the State to prohibit Bartlett from obtaining this highly relevant discovery. An appropriate order is lodged herewith.

DATED this 10th day of November 2015.

/s/ Zane D. Wilson
714 Fourth Avenue, Suite 200
Fairbanks, Ak 99701
Phone: (907) 452-1855
Fax: (907) 452-8154

Email: zane@alaskalaw.com
Attorney Bar #9111108

* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]

Exhibit A

Cook Schuhmann & Groseclose, Inc.

Attorneys at Law
Telephone 907.452.1855 • Facsimile 907.452.8154
• Toll Free 800.550.1855
714 Fourth Avenue, Suite 200 •
Fairbanks, Alaska 99701-4470
www.alaskalaw.com • csg@alaskalaw.com

Barbara L. Schuhmann
Robert B. Groseclose
Jo A. Kuchle
Zane D. Wilson
Craig B. Partyka
Danielle M. Gardner
Mary S. Spiers

July 16, 2014

sender's email address:
zane@alskalaw.com

Via Facsimile

Palmer District Attorney
515 E. Dahlia Avenue, Suite 150
Palmer, AK 99645

Re: State v. Bartlett
Our File No: 5874.01

Dear Mr. Beard:

We understand that there may have been an individual on scene at the time of this incident that took video of the events. Please consider this a formal discovery

request for the name, addresses and phone numbers of any individual who took video of Mr. Bartlett's arrest or the events preceding his arrest.

Your proposed resolution is not acceptable. Mr. Bartlett was assaulted and wrongfully arrested by the troopers involved in this incident.

Thank you for looking into this discovery request.

Sincerely,
COOK SCHUHMANN & GROSECLOSE, INC.

By: /s/_____
Zane D. Wilson

ZDW/nl
cc: client

Exhibit B

SOA 0235- SOA 0236

Niki L. Lightly

From: Zane Wilson
Sent: Tuesday, August 12, 2014 3:14 PM
To: Beard, Raymond E (LAW)
Cc: Niki L. Lightly
Subject: RE: BARTLETT, Russell (3GL-14-25CR)

Dear Mr. Beard:

I understand the rules, I was simply hoping we could accomplish what needs to be done without the formalities-given that Trooper Weight will be a required witness for the State. I thought my letter made clear that this was as a request that you did not have to honor. We will serve Trooper Weight directly. I see no need for you to quash the subpoena we served on you, I am not making any claim that the service on you is effective for anything.

Are you suggesting that Trooper Weight is lacking access/knowledge to the Trooper policies on the points we have requested? If Trooper Weight is unable to produce and discuss the Trooper policies on these issues I will be happy to get that testimony before the jury and leave it at that.

I will file a motion to compel the discovery we are seeking- per existing case law. That is what it generally takes but I always inquire first as the court prefers that counsel make an effort to resolve these issues before bringing them before the court.

As an FYI, I will be caribou hunting on August 18 (I will have an associate attend in my absence) and moose hunting form September 5-12. I am not opposed to trying this case as soon as can be scheduled thereafter but it sounds like we have some discovery issues to litigate.

I look forward to meeting you also.

Zane

From: Beard, Raymond E (LAW) [mailto:raymond.beard@alaska.gov]
Sent: Tuesday, August 12, 2014 2:00 PM
To: Zane Wilson
Subject: BARTLETT, Russell (3GL-14-25CR)

Dear Mr. Wilson,

We received in the mail a subpoena for Trooper Weight to appear and produce at the Glennallen courthouse at an unspecified time on August 19, 2014. The District Attorney's Office does not receive service for Alaska State Troopers. Therefore, we are returning that subpoena to you by U.S. Mail. Please note that service of subpoenas in a criminal case is governed by Criminal Rule 17(d).

As a suggestion, you may be able to obtain the policy information you seek directly from the Alaska Department of Public Safety rather through an individual trooper who may not possess such information. I also believe, but I am not sure, that a defendant seeking such production is required to motion the court for a hearing to address the issue. I

will therefore ask the court to quash this current subpoena.

You also asked in the letter which accompanied the subpoena whether the State intended to respond to your outstanding discovery request. Discovery in a criminal case is handled in a rather perfunctory manner under Criminal Rule 16 – the State provides the defendant with all required discovery without request. That was performed on May 21, 2014 when the State sent you six pages. Those same six pages were sent to you again on June 17, 2014. We have no physical evidence in our possession.

We asked Trooper Weight If there is any audio. He indicated that there is not. I do not know whether some private person videotaped the incident. I would certainly want to view any such video if it exists, and the State would provide that evidence to you if it were in our possession, but is not. If you are able to locate such a recording, I would greatly appreciate the opportunity to inspect and copy.

I'm planning to be in Glennallen for calendar call on August 18. I look forward to seeing you there.

Sincerely,
Ray Beard

Raymond Beard
Assistant District Attorney
Palmer District Attorney's Office
T (907) 761-5648
F (907) 761-5687

Exhibit C

SOA 0435 - SOA 0436

Status/assignment information:

Status: Completed

Opened: Assigned: Due: 04/15/2014 Completed: 05/26/2014

Disposition: Within Policy

Unit assigned: Un-assigned
Handled at field/unit level: No
Investigator assign: Un-assigned
Supervisor assign: Un-assigned
Source of information:

Organizational component(s):

Division: State Troopers
Detachment: B
Post: Palmer

BlueTeam chain routings

Apr 15, 2014 21:34: Sent from Trooper Bryce L Weight [BLW1/308024] to Sergeant Luis A Nieves [LAN1/305069]

Instructions:

Blue team use of force Incident for your review.

Reviewed by Sergeant Luis A Nieves [LAN1/305069] on Jan 16, 2015 at 16:10

Decision: Approved

Reviewer comment:

[Forwarded by Sergeant Luis Nieves]

CC(s) of this routing were sent to the following:

Apr 16, 2014 08:57: Sent from Sergeant Luis A Nieves [LAN1/305069] to Lieutenant Lawrence R Piscoya [LRP0/264203]

Instructions:

LT here is the blue team report as requested for the Arctic Man Incident.

Reviewed by Lieutenant Lawrence R Piscoya [LRP0/264203] on Jan 16, 2015 at 10:07

Decision: Not approved
Missing Information

Reviewer comment:

Sgt. Nieves: Please ensure that all audios for this contact are attached. If there are no audios, for whatever reason, then please forward this back to me.

Apr 16, 2014 10:07: Sent from Lieutenant Lawrence R Piscoya [LRP0/264203] to Sergeant Luis A Nieves (LAN1/305069]

Instructions:

Please add the audio to this incident. If there is no audio, then forward back to me.

Reviewed by Sergeant Luis A Nieves [LAN1/305069] on Jan 16, 2015 at 11:26

Decision: Approved

Reviewer comment:

No audio.

Apr 16, 2014 11:26: Sent from Sergeant Luis A Nieves [LAN1/305069] to Lieutenant Lawrence R Piscoya [LRP0/264203]

Instructions:

No audio. Our new recorders (Olympus DM-620) do not have the remote controls to activate in a dynamic situation. We must manually pull them out of our vests/shirt pockets, take them off hold (side button), press record (front button on face of recorder; poor design that if not on hold will either start or stop recording due to all control functions being on the face of the recorder [stop, record, pause]), put the recorder back on hold, then return it to our pocket. The current remotes available for this recorder retail at $300.00 (DPS supply does not provide this accessory). No audio due to technical design failure.

Reviewed by Lieutenant Lawrence R Piscoya [LRP0/264203] on Jan 16, 2015 at 08:19

Decision: Approved

Reviewer comment:

[Forwarded by Lieutenant Lawrence Piscoya]

Apr 18, 2014 08:19: Sent from Lieutenant Lawrence R Piscoya [LRP0/264203] to Captain Burke W Bartick [BWB0/250337]

Instructions:

> I asked Sgt. Nieves a few questions. He indicates the person is not known by the campsite renters, where the party was occurring. He was heavily intoxicated and Sgt. Nieves indicates he was getting closer and closer to the troopers face from his point of view. The subject was aggressive and intoxicated. By the time, Sgt. Nieves arrived, Trp. Weight pushed the subject away and they took him to the ground. Trp. Weight indicates he felt threaten with Mr. Bartlett's aggressive manner as he approached. He stated in his report that at one time, he felt that Mr. Bartlett was going to hit him and felt threatened.

Reviewed by Captain Burke W Barrick [BWB0/250337] on Jan 16, 2015 at 15:12

Decision: Approved

Reviewer comment:

Exhibit D

SOA 0401 - SOA 0402

FW: BARTLETT, Russell (3GL-14-25, AK 14025280) https://webmaila.alaska.gov/owa/?ae=Item&t=IPM.Note&id=RgAAA ... 2 of 3

Alaska State Troopers
Recruitment/Background Unit
Toll Free: 877-AKTROOP
Fax: 907-269-5751
JOIN THE STATE TROOPERS
Like Us On **facebook**
twitter

From: Beard, Raymond E (LAW)
Sent: Monday, December 01, 2014 2:12 PM
To: Nieves, Luis A (DPS)
Subject: RE: BARTLETT, Russell (3GL-14-25, AK 14025280)

I watched the video clip that is on KTVA's website. I don't like the editing of it. I would like to get the original footage.

From: Nieves, Luis A (DPS)
Sent: Monday, December 01, 2014 1:17 PM
To: Beard, Raymond E (LAW)
Cc: Despain, Timothy J (DPS); Peters, Megan A (DPS)
Subject: RE: BARTLETT, Russell (3GL-14-25, AK 14025280)

Ray,

The reporter in this case was also the camera man. He was standing next to or near me throughout my entire contact at this camp site. https://www.youtube.com/watch?v=PiyXomUflu4

I am working on getting contact info from our PIO now.

Let's just issue him a subpoena to appear.

Lu

Sergeant Luis Nieves
Alaska State Troopers
Recruitment/Background Unit
Toll Free: 877-AKTROOP
Fax: 907-269-5751
JOIN THE STATE TROOPERS
Like Us On **facebook**
twitter

From: Beard, Raymond E (LAW)
Sent: Monday, December 01, 2014 1:11 PM
To: Nieves, Luis A (DPS)
Subject: RE: BARTLETT, Russell (3GL-14-25, AK 14025280)

Thank you. I viewed the video on their website. Do you think we can obtain the uncut footage of the incident, and the contact info of the film crew?

From: Nieves, Luis A (DPS)
Sent: Monday, December 01, 2014 1:01 PM
To: Beard, Raymond E (LAW); Miner, Joel A (DPS); Weight, Bryce L (DPS

Subject: RE: BARTLETT, Russell (3GL-14-25, AK 14025280)

We have the media that was with us. Channel 2 news I believe. This incident was on the news.

Sergeant Luis Nieves
Alaska State Troopers
Recruitment/Background Unit
Toll Free: 877-AKTROOP
Fax: 907-269-5751
JOIN THE STATE TROOPERS
Like Us On **facebook**
twitter

From: Beard, Raymond E (LAW)
Sent: Monday, December 01, 2014 12:05 PM
To: Nieves, Luis A (DPS); Miner, Joel A (DPS); Weight, Bryce L (DPS)
Subject: BARTLETT, Russell (3GL-14-25, AK 14025280)

Troopers,

Please call me regarding this Arctic Man case. It was filed as a resisting arrest and disorderly conduct. I am considering adding a fear assault against Trooper Weight and an attempted assault against Sgt. Nieves.

The defense, attorney Zane Wilson of Fairbanks, is attempting to make this out as though Trooper Weight assaulted Bartlett. Wilson called ready at Glennallen's trial week in October. Rule 45 is running so we may have to go to trial next week, but we also have other

cases in Glennallen with time running. So Bartlett may go later.

My direct line in the office is [redacted]. My personal cell is [redacted].

Thanks,
Ray

Raymond Beard
Assistant District Attorney
Palmer District Attorney's Office
T (907) 761-5648
F (907) 761-5687

Exhibit E

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
AT FAIRBANKS

Case No. 4:15-cv-4 SLG

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
v.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Defendants,	)

PLAINTIFF'S SECOND SUPPLEMENTAL DISCLOSURE STATEMENT

Plaintiff, Russell Bartlett, hereby submits his second supplemental disclosures as required by Alaska R. Civ. P. 26(a)(1).

D. DISCOVERABLE DOCUMENTS

The following documents are attached:

1. Copy of Alaska Dispatch News web article, indentified as Bartlett.070-071.

DATED this 24, day of September 2015.

/s/Zane D. Wilson
Zane D. Wilson, # 9111108
714 Fourth venue, Suite 200
Fairbanks, AK 99701
Phone: (907) 452-1855
Fax: (907) 452-8154
Email: zane@alaskalaw.com
Attorney Bar #9111108

* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]

Alaska Dispatch News

Published on *Alaska Dispatch News* (http://www.adn.com)

Home > Newspaper files complaint after Alaska trooper seizes reporter's memory card

Michelle Theriault Boots [1]
September 6, 2015

The Mat-Su Valley Frontiersman has filed a complaint with the state Department of Public Safety after a veteran Alaska State Trooper pulled over a reporter last week and seized his camera memory card, saying news-gathering images of an arrest constituted "evidence."

The Wasilla newspaper's complaint says trooper Sgt. Mike Ingram's actions violated constitutional protections of freedom of the press and against unlawful search and seizure.

The Department of Public Safety, which oversees troopers, says it is investigating.

The incident happened when Frontiersman reporter Brian O'Connor went to cover a reported shooting near the Parks Highway in Willow Wednesday morning, the newspaper wrote in a front page article published Sunday. [2].

O'Connor took photos of a man being arrested from a public roadway about 100 yards away and then left in his personal vehicle, according to Frontiersman Managing Editor Matt Tunseth. O'Connor had twice identified himself as a journalist at the scene, the newspaper said.

The reporter had driven a couple of miles from the scene when Ingram pulled him over.

The trooper "demanded that O'Connor turn over either his camera or the digital memory card containing pictures of the arrest, saying it was potential evidence," according to the newspaper's published account of events [2].

O'Connor offered to share the images with authorities. but "Ingram said he had to take the card into his possession" and the reporter complied, the article said.

There was never any explicit threat of arrest and the exchange was cordial, Tunseth said.

Still, the reporter was ordered to give up his camera or memory card by a uniformed law enforcement officer.

"Brian's understanding was that he had to do this," Tunseth said.

After hearing about what happened, Tunseth and publisher Mark Kelsey contacted troopers to ask about the incident. Within a few hours, the memory card was returned.

None of the photos had been deleted, according to Tunseth, a former Alaska Dispatch News sports reporter who recently took the helm at the Mat-Su paper.

On Friday, after the paper filed its formal complaint, the newspaper was told an internal investigation was underway.

The newspaper is not asking for the trooper to be disciplined.

The editor and publisher spoke directly to the director of the Department of Public Safety, Col. James Cockrell.

"I have every assurance from Col. Cockrell that they are taking this seriously," Tunseth said.

Cockrell declined to answer questions about the incident Sunday.

The department released a statement through spokeswoman Beth Ipsen saying it would have no comment until an investigation through the Office of Professional Standards had been completed.

"We will not be commenting further until we have had a chance to review the information to determine what happened and if any department policies were violated or if the actions of the troopers involved were warranted under the circumstances," the statement said.

On Sunday, the newspaper ran a news article and editorial [3] about the incident that praised the department as a "highly professional and distinguished group" but said it "acted contrary to the public's trust" and needed to be held accountable.

"We've always had good relations with (troopers)," Tunseth said. "We just think this could have been handled a little differently."

Source URL: http://www.adn.com/article/20150906/newspaper-files-complaint-after-alaska-trooper-seizes-reporters-memory-card

Links:
[1] http://www.adn.com/author/michelle-theriault-boots.
[2] http://www.frontiersman.com/news/frontiersman-files-trooper-complaint/article_6d1cca68-543f-11e5-a5c1-a3fce5b89fc1.html
[3] http://www.frontiersman.com/opinions/troopers-must-be-held-accountable/article_d5d0b4de-543f-11e5-ba9e-7701d9f8e307.html

In The Matter Of:
RUSSELL BARTLETT v.
LUIS NIEVES, et al.,

LUIS NIEVES
July 31, 2015

Metro Court Reporting
405 West 36th Avenue, Suite 201
Anchorage, Alaska 99503
metro@gci.net

* * *

[p.28]

A I was -- I was the one in charge.

Q You were the sergeant?

A I was -- yes, and I was the senior person present and the senior person on call and on shift at the time.

Q When -- let me back up here. And how did it come about that a -- the Channel 2 news crew was at the Arctic Man with the pol -- with the Troopers?

A They made a request through the Public Information Office at Headquarters and they received permission to ride with the -- with the Alaska State Troopers to observe the Arctic Man, the event. And Lieutenant Piscoya directed me to have the news crew ride with me.

Q Did you play any role in Lieutenant Piscoya's decision to have the news crew ride with you?

A No.

Q I mean, did you -- did you request it?

A No, I was assigned.

Q Do you believe that having a news crew with you in any way impacts how you go about doing your job as a police officer?

A No.

Q When did you arrive at the party that -- I mean, I'll ask you this. If we can ref -- if we refer to it you understand what I'm saying at .....

A Uh-huh (affirmative).

* * *

[p.30]

the Troopers and the public.

Q And -- so, at the time you respond to Mr. Sadler's party you have this TV crew with you, is that correct?

A Yes, it's one cameraman with a camera.

Q And who was that cameraman?

A I don't remember his name.

Q Does John Thain ring a bell?

A Yes. Yes, John Thain.

Q And at the time you arrive you know that this cameraman, Mr. Thain what he's up to is he's following around with you videotaping, correct?

A Yes. He's making the news story.

Q How long had you been with Mr. Thain prior to your arrival at Mr. Sadler's party?

A I think several hours. I'm not sure there -- how long but it was several hours at that point.

Q And as part of this cameraman thing you were mic'd up with -- with something specific to the cameraman or you had your own mic or how was it .....

A No. They -- they placed a mic on me, Mr. Thain placed a mic on me.

Q And how did he -- how did he do that, what did he do?

A It's their wireless mic, it has like a -- a little box receiver and then a -- a microphone similar to what I'm wearing right now and it's a wireless.

[p.31]

Q So, before you got out of the car is it fair to say that you knew you were going there to investigate minor consuming?

A Yes.

Q If you know you're going to a scene to investigate why don't you activate your audio recorder at that point?

A At that point I had multiple officers, music, it was a -- a -- I had just spoken to one of the Troopers there and -- which was Trooper Weight who advised me of the situation. I didn't activate my recorder. I

have a -- don't have a reason why I didn't activate my recorder I just went in to go and speak with the -- my goal was to speak with who -- who was ever in charge of the camp site and tell them that people were that kids were talking their alcohol and they needed to store their alcohol.

Q Sure. You would -- would you agree with me that you could have easily activated your recorder before you got out of your police vehicle?

A It -- it depends. The -- the -- this type of a recording system that I have if -- if I allow myself enough time for officer safety I can activate this -- this recorder but in this situation where it was -- it was still developing I -- I just didn't think of activating it at the time. I didn't know what I had inside the campground itself with all the loud music and everything else and

* * *

[p.36]

A I had a reason to be there.

Q ..... how many minors did you see consuming alcohol there?

A My -- my Troopers reported more than one and that's more than enough for me to know that it's a concern.

Q That's fair enough. But my -- so, my question to you is, how many minors were there to your knowledge?

A I don't know.

Q Was it fairly obvious to you that the vast majority of the folks there were adults?

A No. That's why I had to -- that's why I had to get on to the camp site and see what was going on there.

Q So, did you have an understanding as you got out of your vehicle and approached this party, did you have an understanding as to whether or not Mr. Thain was, in fact, videotaping the events?

A I don't know. I don't know.

Q Did you ever ask him?

A No. I -- I had to focus -- I'm not focusing on him, I'm focusing on the safety of my officers and the safety of the scene and the fact that there's juveniles consuming alcohol.

Q Well, you certainly had an understanding that was the whole reason he was there, right, was to videotape events?

MS. GALBRAITH MOORE: Objection, form, ...

* * *

[p.38]

Q And you knew that before you got out of the vehicle and approached Mr. Sander's party, correct?

MS. GALBRAITH MOORE: But -- okay.

A I don't know what he was filming at that point.

Q That's not what I asked you. At -- at -- my question was you knew that the reason he was there was to videotape to make a news story and you knew that

before you got out of the car and approached the Sadler party?

MS. GALBRAITH MOORE: Objection, form of the question and foundation.

A I knew that he was riding with me to film Arctic Man to make a news story, yes.

Q (By Mr. Wilson) And you knew that before you got out of the car to approach Mr. Sadler's party?

A I knew that before I even left headq -- the command center with him.

Q At -- the -- this -- we'll come back to this but after we get done with you -- after you've dealt with the situation there at Mr. Sadler's party did you ever go back to Mr. Thain and ask him whether or not he had videotaped any of these events so that you could have that record of these events?

A No.

Q Why didn't you ask him?

A It's not my -- it's -- it's not my property. It's -- and

[p.39]

I -- and I don't know what he was recording, I don't know when he turned on his recorder or not.

Q And the way you answer those questions is you ask him, right?

A I had no obligation to ask him.

Q Whether you had an obligation to or not why didn't you?

A Because I had no obligation to do so, there was no reason to.

Q So, you have somebody who probably is videotaping the events that take place in which you're going to charge somebody with a crime and your testimony is that you have no reason to ask them whether or not they videotaped .....

MS. GALBRAITH MOORE: Ob.....

Q ..... those events?

MS. GALBRAITH MOORE: Objection, form and foundation.

A He -- he's a member of the media, I have no idea nor any control over what he's filming, whether he turns on his recorder or not. My obligation is to ensure that my officers are safe, that people are obeying the law and if someone's sa -- needs to be arrested they're arrested.

Q (By Mr. Wilson) Go back to my question. Is it your testimony that you go to a incident like this with Mr. Sadler's party, you jump on somebody, physically arrest them, okay, intend to bring charges against them and that

[p.40]

there is quote: No reason to ask the video guy whether or not he video recorded those events, is that you testimony?

MS. GALBRAITH MOORE: Objection, ...

A I .....

MS. GALBRAITH MOORE: .....form, foundation. That's -- that was not his testimony and don't -- don't try.....

MR. WILSON: Well, whatever.

MS. GALBRAITH MOORE: ..... (indiscernible - simultaneous speaking).

MR. WILSON: That's -- that's why I'm asking him.

MS. GALBRAITH MOORE: (indiscernible - simultaneous speaking) those face were not on the table.

A No. My -- my obligation is to figure out why your client was trying to attack my -- my Trooper and why your -- your client was being aggressive toward my Troopers and why we eventually had to arrest him because he was acting in a manner that wasn't reasonable and was creating a dangerous situation for all my officers there.

Q (By Mr. Wilson) Let me ask the question a different way and hopefully I can get an answer this time. Why isn't that enough of a reason to go to the -- Mr. Thain and say, hey, you just were there, right there acting like you're videotaping this that's going on here, did you actually videotape it? What .....

[p.41]

A There's no obligation.

Q Mr .....

A We have more than enough .....

Q ..... Mr. Nieves I'm not asking .....

A ..... we had more than enough.

Q ..... about your obligations, okay.

A Uh-huh (affirmative).

Q I'm asking you why isn't that a sufficient reason to ask him?

MS. GALBRAITH MOORE: Just for clarification what is the that? Why didn't -- what is .....

Q The incident that took place with Mr. Bartlett, the fact that you know Mr. Thain was there probably videotaping it, why isn't that a sufficient reason for you to ask Mr. Thain whether or not he videotaped the events?

A I don't know if he recorded and I didn't need anything from him at the time because I already had testimony from my Troopers that were on scene and my observations of a crime that was committed which was disorderly conduct and resisting arrest.

Q And you also knew that none of you there were activating your tape recorders to record the events, correct?

A I had no idea.

Q Well, you knew you hadn't, ...

A I had no .....

* * *

[p.114]

SIGNATURE

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, LUIS A. NIEVES, have read the foregoing deposition, and have made corrections thereto. Any and all changes, explanations, deletions and/or additions to my testimony may be found on the correction sheet (s) enclosed with this transcript.

LUIS A. NIEVES

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on this Day of 2015, before me appeared LUIS A. NIEVES, to me known and known to be the person named in and who executed the foregoing instrument, and acknowledge voluntarily signing and sealing the same.

Notary Public in and for
State of Alaska, at Anchorage
My Commission Expires:

In The Matter Of:
RUSSELL BARTLETT v.
LUIS NIEVES, et al.,

JOHN THAIN
September 18, 2015

Metro Court Reporting
405 West 36th Avenue, Suite 201
Anchorage, Alaska 99503
metro@gci.net

* * *

[p.10]

story.

Q Okay. And what did you do to prepare Trooper Nieves for this, I mean did you mic him? I mean how -- what did you do that involved him and you working together to be able for you to participate -- prepare this story?

A Yeah, he wore a wireless microphone and I just kinda stayed near by him through the whole evening.

Q And did you provide the wireless microphone?

A Yes.

Q And how did that wireless microphone work, was it something that was continuous or something that was not continuous?

A It's hooked directly into the TV camera so it records audio only when the camera is rolling.

Q And then what's your overall approach to something like this, are you just shooting video pretty much constantly when there's any kind of activity and you edit from there, or do you kinda self edit as you shoot video?

A Yeah, I -- I just shoot a lot of video, I think I shot about an hour of video over the four hours and cut it down to a two or three minute piece.

Q Is there any doubt in your mind that even before this process took place that Trooper Nieves was fully aware of the fact that you were videoing and recording his activities?

* * *

[p.13]

camera how bright, how obvious is that?

MS. GALBRAITH MOORE: Objection, form. Are we talking about obvious to people who are sober or not sober?

MR. WILSON: To a normal person.

A I don't know how bright the light is exactly, it's a LED panel. I guess it depends on the amount of light that's in the scene. When you turn it on you may or may not notice it.

Q (By Mr. Wilson) Did you have any conversation with Trooper Nieves about you -- were you gonna give him any indication when you started videotaping, or that was just kind of in your discretion and he

didn't know necessarily you were videotaping, except if you had your camera on your shoulder and were looking at him? Or explain to me what you discussed in that regard.

A There was really no discussion I just told him I would be filming throughout the night.

Q At this time do you have all of the video that you took at Arctic Man?

A No.

Q And explain to me what's the process for how that -- you have all this video that you take and how you wind up with no longer having all that video.

A Yeah, I -- we take a lot of video and we edit it all down to a finished piece usually that day or soon after. And

[p.14]

then the -- the raw video, the -- everything that was recorded gets deleted a few months down the line.

Q Can you give me any more specifics other than a few months down the line, I mean is there a policy in that regard, like 60 days, 90 days?

A The -- the idea at our station is to save stuff for six months but sometimes that doesn't happen.

Q Do you in fact know how long this particular video of your ride along with Trooper Nieves was in fact saved before it was deleted following the events you videotaped?

A No.

Q Is there any way you can ascertain that?

A No.

Q Who in fact deletes that video?

A It's usually our operations manager David DeGraffenreid.

Q Can you say that name again?

A David DeGraffenreid.

Q Could you spell that for us?

A I'm not sure how to spell DeGraffenreid actually. I can look it up.

Q Can you give us your best shot?

A Hold on one second I do have it here. It's -- DeGraffenreid is capital D-e capital G-r-a-f-f-e-n-r-e-i-d.

* * *

[p.61]

SIGNATURE

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, JOHN THAIN, have read the foregoing deposition, and have made corrections thereto. Any and all changes, explanations, deletions and/or additions to my testimony may be found on the correction sheet (s) enclosed with this transcript.

JOHN THAIN

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on this Day of 2015, before me appeared JOHN THAIN, to me known and known to be the person named in and who executed the foregoing instrument, and acknowledge voluntarily signing and sealing the same.

Notary Public in and for
State of Alaska, at Anchorage
My Commission Expires:

In The Matter Of:
RUSSELL BARTLETT v.
LUIS NIEVES, et al.,

BRICE WEIGHT
July 31, 2015

Metro Court Reporting
405 West 36th Avenue, Suite 201
Anchorage, Alaska 99503
metro@gci.net

* * *

[p.23]

would it be .....

A I understand.

Q ..... accurate to say that it is your standard practice?

A Before I contact someone that I'm going to charge criminally I try to audio record -- or start my audio recorder.

Q And why did you not do that at -- in this instance as you exited your vehicle? Well, act -- back up, did you?

A No.

Q Okay. Why did you not?

A I would say a couple different reasons. One, I don't know for sure if I am going to be contacting someone that's being charged criminally. Two, minor consuming is not criminal unless it's the

third one, the third time you've been charged with it, of course. And three, every time we got out of the vehicle which was many times throughout the course of the events or so, several days, every time you got out of your vehicle no, you don't activate your audio recording every single time. Sometimes you're just walking around saying hi to people, people are waving at you, you're waiving at them.

Q You had your audio recorder on you on this day, correct?

A I did.

Q And it was functioning, is that correct?

A I believe so.

* * *

[p.96]

SIGNATURE

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, BRYCE L. WEIGHT, have read the foregoing deposition, and have made corrections thereto. Any and all changes, explanations, deletions and/or additions to my testimony may be found on the correction sheet (s) enclosed with this transcript.

BRYCE L. WEIGHT

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on this Day of 2015, before me appeared BRYCE L. WEIGHT, to me known and known to be the person named in and who executed the foregoing instrument, and acknowledge voluntarily signing and sealing the same.

Notary Public in and for
State of Alaska, at _____
My Commission Expires:

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. 4:15-cv-00004-SLG

[Filed January 29, 2016]

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
v.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Defendants.	)

MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT

Introduction

This case arises out of Russell Bartlett's arrest for disorderly conduct at Arctic Man, an extreme ski event held annually in the Hoodoo Mountains near Paxson, Alaska. According to a KTVA news story, Arctic Man attracts so many people that "for three days campers turn the Hoodoo Mountains into Alaska's fourth largest city."[1] Arctic Man's remote location, large crowds, and

[1] Plaintiff's Ex. A to the Complaint.

the high levels of alcohol use, however, raise significant law enforcement challenges.

In April 2014, on the last night of Arctic Man, and after several hours of drinking, Russell Bartlett interfered with a trooper's investigation of minors consuming alcohol and was charged with disorderly conduct and resisting arrest. The State of Alaska pursued Bartlett's prosecution for several months, but because of State budget issues, later dismissed the case. Bartlett then sued the troopers who arrested him, claiming false arrest, false imprisonment, malicious prosecution, and excessive force. But contrary to Bartlett's assertions, the State's disorderly conduct charges against him were "neither novel nor extravagant," probable cause to arrest him existed, and the use of force to secure Bartlett and make the arrest was reasonable and measured. Bartlett was not injured.

Troopers Luis Nieves and Bryce Weight are entitled to qualified immunity on Bartlett's 42 U.S.C. § 1983 claims of false arrest, false imprisonment, and malicious prosecution. Absolute immunity also bars the malicious prosecution claims because the prosecutor took responsibility for the criminal case. Bartlett's due process and conspiracy claims also fail as a matter of law.

Facts

A. "Crazed Nights" at Arctic Man.

Arctic Man has been described as "Wild Rides and Crazed Nights at America's Most Extreme Ski Race."[2] These "crazed nights" create public safety concerns because large groups of campers congregate in remote areas to drink and party, often from dusk to dawn.[3] Chaos and dangerous situations have arisen and resulted in arrests for alcohol fueled crimes. Troopers are assigned to protect and ensure public safety, working in shifts and staying in nearby military housing throughout the event.[4] Because the event's remote location limits the availability of law enforcement backup, AST deploys procedures for coverage at Arctic Man that seek to identify and minimize the heightened risks to campers and to the troopers.[5] These procedures include requiring troopers to pair up upon entering the beer tent and controlling unruly campers before injuries and crimes occur.[6]

---

[2] White, Matt. Arctic Man, Wild Rides and Crazed Nights at America's Most Extreme Ski Race" http://www.sbnation.com/longform/2014/7/23/5923357/

[3] Ex. A, ¶ 2; Ex. B, ¶ 5.

[4] Ex. B, ¶ 5.

[5] Ex. B, ¶ 4.

[6] Ex. B, ¶ 4.

B. Bartlett interfered with an investigation.

On the last day of Arctic Man in 2014, a large outdoor party attracted many campers, including underage drinkers. Troopers Weight and Miner were patrolling when they saw several minors at the party who appeared to be drinking.[7] Shift supervisor Sgt. Luis Nieves went to provide backup and to look for the source of the alcohol.[8] He found a keg outside of a parked RV and asked the owners to move the keg inside the RV.[9]

Russell Bartlett walked toward the RV, got within five feet of Sgt. Nieves and demanded to know what was going on.[10] Bartlett yelled as Bartlett approached the RV and told the RV owner not to cooperate with troopers.[11] Sgt. Nieves tried to communicate with Bartlett but found that to be futile.[12] Sgt. Nieves was concerned that given Bartlett's apparent intoxication and his hostility to troopers, further interaction with Bartlett could needlessly escalate the situation.[13] Nieves' perception of Bartlett's intoxication was confirmed by Bartlett's friend David Krack, who later

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[7] Ex. G, ¶ 2.

[8] Ex. D, [Tr. 31:14-17].

[9] Ex. D, [Tr. 31:14-17, Tr. 70:1-13].

[10] Ex. E, [Tr. 21:14-22:15].

[11] Ex. D, [Tr. 62: 10 – 23]; Ex. F, [Tr. 68:13-69:4].

[12] Ex. D, [Tr. 65: 7-25].

[13] Ex. D, [Tr. 65:8-19].

admitted that he and Bartlett had been drinking beer throughout the night and were too intoxicated to safely drive.[14] Sgt. Nieves began returning to his trooper vehicle to leave.[15]

Meanwhile, Trooper Miner was in his vehicle processing underage drinkers while Trooper Weight contacted a teenager in the beer-thronged crowd. That teen was drinking. Trooper Weight then asked a second teenager to step away from the crowd.[16] At that point, Bartlett and Krack approached Trooper Weight, and Bartlett began yelling and demanding that Trooper Weight not talk to the teen.[17] Bartlett walked toward Trooper Weight and stopped within arm's reach.[18] Despite Trooper Weight's efforts to explain the situation to him, he found that trying to do so was futile as Bartlett continued to demand that Trooper Weight not talk to the teenager and to leave.[19]

Holding a beer in his lowered left hand, Bartlett raised his voice more and his right hand gestured toward Trooper Weight.[20] David Krack, who was roughly 10 feet away and had a clear view of Bartlett's

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[14] Ex. E, [59: 1-12].

[15] Ex. A, ¶ 3.

[16] Ex. G, ¶ 3.

[17] Ex. C, [Tr. 33:12-17, 34:3-6]; Ex. E, [29: 11-20].

[18] Ex. C, [Tr. 36:25-37:2, 37:16-22, 40:25-41:2, 43:2-5]; Ex. G ¶¶ 3-4.

[19] Ex. C, [Tr. 35:11-24].

[20] Ex. C, [Tr. 36:7-11].

right side, testified that Bartlett's right hand was raised toward Trooper Weight's face.[21] Bartlett's hand was close to Trooper Weight's face pointing.[22] The enhanced video of the arrest obtained by Assistant District Attorney Raymond Beard is consistent with this testimony.[23] Believing that Bartlett was about to assault him,[24] Trooper Weight placed his open palms on Bartlett's chest and, using a single push, moved Bartlett back to create a safer distance between the two men.[25]

From more than 50 feet away, Sgt. Nieves saw Bartlett walk toward Trooper Weight and the teen.[26] Believing that Bartlett was about to assault Trooper Weight, Sgt. Nieves rushed to assist.[27] As he approached, Sgt. Nieves heard Trooper Weight order Bartlett back and saw him move Bartlett back.[28] Sgt. Nieves believed that Trooper Weight perceived Bartlett to be a threat.[29] Thus, given Nieves' prior contact with

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[21] Ex. E, [Tr. 29:19-22, 33:17-34:3, 61:2-12].

[22] Ex. G, ¶ 7, attachment 2.

[23] Ex. H.

[24] Ex. C, [Tr. 36:19-22, 37:9-14, 54:18-20, 87:16-20].

[25] Ex. G, ¶ 4; Ex. C [Tr. 52:22-23].

[26] Ex. A, ¶ 5; Ex. D, [Tr. 72:3-15].

[27] Ex. D, [Tr. 82:12-15, 88:1-4].

[28] Ex. D, [Tr. 93:18-94:1].

[29] Ex. D, [Tr. 78: 4-9].

Bartlett near the RV, Bartlett's aggressive approach toward Trooper Weight, Bartlett's stance, and Trooper Weight's defensive push, Sgt. Nieves moved forward to arrest.[30]

Sgt. Nieves took hold of Bartlett's left arm and repeatedly ordered him to back up and to get down.[31] Trooper Weight then moved forward to assist as Nieves continued to order Bartlett to get to the ground.[32] The enhanced video shows Bartlett pulling his bent left arm away from Sgt. Nieves while yelling directly at the uniformed trooper.[33] Bartlett turned toward Nieves and then toward Weight while tensing his arms.[34] Trooper Weight attempted a leg sweep to get Bartlett to his knees.[35] Eventually Bartlett dropped to one knee, then the other, and then to all fours, but continued to tense his upper back and neck against the troopers' efforts to gain compliance.[36] Bartlett admits that he tried to

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[30] Ex. A, ¶ 6.

[31] Ex. A, ¶ 6.

[32] Ex. G, ¶ 5.

[33] Ex. H.

[34] Ex. G. ¶ 5; Ex. D, [Tr. 77:15-18].

[35] Ex. G, ¶ 5.

[36] Ex. G, ¶ 5.

"control" the takedown.[37] Ultimately, Bartlett complied with trooper commands and no one was hurt.[38]

Bartlett's arrest at the party was videotaped by a KTVA reporter covering a story on Arctic Man. The tape was edited by KTVA to delete Bartlett's profanities.[39] The quality of the video is not uniformly clear, depicts only a portion of the contact, and does not show the troopers' perspectives.[40] Even with these limitations, the video confirms some relevant aspects of the contact. At 1:44 to 1:55 the video shows that the troopers were investigating underage drinking at the large party. Trooper Weight is seen reporting to Sgt. Nieves upon Sgt. Nieves' arrival. At 1:55 to 2:01, the video shows Sgt. Nieves requesting the RV owner to move the keg inside the RV. The video confirms that Bartlett stood close to Trooper Weight and confirms — consistent with Trooper Weight's testimony — that Bartlett's presence caused Trooper Weight to stop his interview of the teenager.

The video from 2:03 to 2:09 shows Sgt. Nieves approaching Trooper Weight, the teenager, and

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[37] Ex. F, [Tr. 80:18-23].

[38] Ex. G, ¶ 8.

[39] Bartlett submitted the KTVA video with the complaint. The "enhanced" portion that the ADA secured in the criminal case is submitted here as Ex. H.

[40] Ex. I, [Tr. 44: 1-13]. Because the video was shot at 30 frames per second, watching the video by advancing just one second at a time will exclude from view 29 of 30 frames. Film uses a series of still frames to create the illusion of motion.

Bartlett. The video reveals that at 2:06 Trooper Weight moves Bartlett back. At 2:06 Bartlett's forehead comes into view, indicating that Bartlett was closing his distance towards Sgt. Nieves. At 2:07 Bartlett is shown facing Sgt. Nieves and for a split-second the camera's view of Bartlett is blocked by Sgt. Nieves. Sgt. Nieves moves to Bartlett's left side. By 2:10, Bartlett changes direction toward Trooper Weight, and at 2:11 Bartlett's head appears to come close to Trooper Weight's head. At 2:11 to 2:12 Trooper Weight attempts to bring Bartlett's right hand downward but Bartlett's arm stops moving. A frame from the video shows Bartlett yelling directly at Sgt. Nieves.[41] Sgt. Nieves repositions himself and then Bartlett pulls his own arm to chest level. Trooper Weight's leg sweep at 2:13 appears to be somewhat unsuccessful initially, with Bartlett's head coming very close to hitting Trooper Weight's face in the process. The troopers are then shown trying to bring Bartlett to the ground, using downward pressure and their body weight, with their heads and bodies at times close to Bartlett's head.

Afterwards, Sgt. Nieves informed Bartlett that he was going to jail for harassment.[42] Bartlett made several phone calls, made bail, and was released after a couple of hours.[43] No one was injured during Bartlett's arrest, including Bartlett.[44]

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[41] Ex. N; Ex. A. ¶ 6, Attachment 4.

[42] Ex. A, ¶ 8.

[43] Ex. F, [Tr. 27; 3-5]; Ex. E, [Tr. 41:1-22].

[44] Ex. F, [Tr. 91:11-14, 100:23-101:5].

After Bartlett was taken to the AST field tent, Trooper Weight, concerned that Bartlett was running interference for the teen who Weight had previously suspected of drinking, completed his interview with the teen and conducted a portable breath test.[45] Meanwhile, Sgt. Nieves called for additional trooper support for crowd control.[46] The KTVA reporter acknowledged that Bartlett's arrest was the biggest event he observed that night, and that his news story – based on principles of objective journalism – centered on troopers enforcing underage drinking limits and otherwise keeping people safe at Arctic Man; the story was not about troopers using unreasonable force or engaging in unfair arrests.[47]

C. The State prosecutes Bartlett.

Trooper Weight prepared a criminal complaint charging Bartlett with disorderly conduct in violation of AS 11.61.110(a)(6), stating that Bartlett had recklessly created a hazardous condition for others with no legal justification or excuse, and for resisting arrest in violation of AS 11.56.700(a). The State of Alaska's district attorney's office screened the case and assumed responsibility for the prosecution.[48] The case was prosecuted by Assistant District Attorney Ray Beard, who believes that probable cause existed to charge Bartlett with disorderly conduct and resisting

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[45] Ex. C, [Tr. 68:5-69:1-5].

[46] Ex. A, ¶ 8.

[47] Ex. I, [Tr. 24:16-21, 52:15-53:1-25].

[48] Ex. J, ¶ 5.

arrest.[49] Although Bartlett filed several motions in the criminal case, he never challenged probable cause.[50]

ADA Beard subpoenaed the KTVA edited video footage and later obtained a high-resolution portion of the video.[51] ADA Beard concluded that the video footage corroborates the troopers' observations of Bartlett's conduct, and after settlement discussions failed, the parties prepared for trial.[52] The District Attorney's Office later dismissed the criminal case due to budget problems.[53]

Applicable legal framework

A. Civil Rule 56 standards for summary judgment

Under Federal Civil Rule 56(c), summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists only if the evidence would allow a reasonable fact finder to return a verdict for the nonmoving party.[54] The mere existence of "*some* alleged factual dispute between the parties will not defeat an

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[49] Ex. J, ¶ 11.

[50] Ex. I.

[51] Ex. J, ¶¶ 6, 10.

[52] Ex. J, ¶ 8.

[53] Ex. J, ¶ 11.

[54] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

otherwise proper motion for summary judgment."[55] When considering an undisputed recording, such as a video recording, the court should view the facts in the light in which they are depicted by the recording, and should not defer to a strained interpretation of such evidence.[56] When, in cases like this, however, the court must consider an officer's on-scene perspective, the court should not conflate the officer's perspective with the camera's perspective.[57]

B. Qualified immunity analysis under 42 U.S.C. § 1983.

Qualified immunity offers complete protection to government officials sued in their individual capacities when their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known.[58] Government officials should not fear personal liability when making discretionary calls.[59] Few individuals would endure public service if they risked personal liability as a result of their official decisions and actions.[60] Qualified

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[55] *Id.* at 247-248 (emphasis in original).

[56] *Scott v. Harris*, 550 U.S. 372, 380 (2007).

[57] *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2473 (2015) (court determines objective reasonableness from the perspective of a reasonable officer on the scene and not with the 20/20 vision of hindsight.).

[58] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

[59] *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

[60] *Malley v. Briggs*, 475 U.S. 335, 339 (1986).

immunity is thus important to "society as a whole."[61] Because of this societal purpose, a reasonable (even if mistaken) belief that an officer's conduct was legal is all that is necessary for qualified immunity.[62]

Whether a right is "clearly established" is determined by federal law.[63] The right must be established not just as a general proposition, but in a "more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[64] It is "vital" that this inquiry be undertaken in light of the specific context of the case before the court.[65] Absent a closely corresponding factual and legal precedent, a court should only cautiously conclude that a right is "clearly

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[61] *San Francisco v. Sheehan*, 135 S.Ct. 1765, 1774 n. 3 (2015) *citing Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) and adding that "the Court often corrects lower courts when they wrongly subject individual officers to liability. See, *e.g.*, *Carroll v. Carman*, 574 U.S. ——, 135 S.Ct. 348, 190 L.Ed.2d 311 (2014) (*per curiam*); *Wood v. Moss*, 572 U.S. ——, 134 S.Ct. 2056, 188 L.Ed.2d 1039 (2014); *Plumhoff v. Rickard*, 572 U.S. ——, 134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014); *Stanton v. Sims*, 571 U.S. —— , 134 S.Ct. 3, 187 L.Ed.2d 341 (2013) (*per curiam*); *Reichle v. Howards*, 566 U.S. ——, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012)."

[62] *Saucier v. Katz*, 533 U.S. 194, 206 (2001).

[63] *Davis v. Scherer*, 468 U.S. 183, 193-97 (1984).

[64] *Saucier v. Katz*, 533 U.S. at 194, 202 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

[65] *Saucier*, 533 U.S. at 201.

established."[66] A plaintiff bears the burden of proving that the specific right allegedly violated was clearly established at the time of the alleged violation.[67]

Qualified immunity analysis may be undertaken in two steps.[68] If the court finds in the first step that a constitutional violation occurred, the court must take a second step and analyze whether the law at the time of the alleged act gave the officer fair warning that the act was unconstitutional.[69] If the law was not clearly established, qualified immunity applies.[70]

Argument

I. Bartlett's false arrest claim fails because probable cause existed to arrest him.

Bartlett sues the troopers for false arrest and false imprisonment under 42 U.S.C. Section 1983. The Ninth Circuit analyzes claims for false arrest and imprisonment under the two-step qualified immunity analysis as follows: "(1) whether there was probable

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[66] *Brosseau v. Haugen*, 543 U.S. 194, 199-01 (2004)(when no factually similar Fourth Amendment case "squarely governs," law is not clearly established).

[67] *Hunter v. Bryant*, 502 U.S. 224, 233(1991); *Davis*, 468 U.S. at 197.

[68] *Pearson v. Callahan*, 129 S.Ct. 808, 823 (2009)(court has discretion to decide which step of the analysis it will address first).

[69] *Saucier, 533 U.S.* at 200-202; *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

[70] *Saucier*, 533 U.S. at 202.

cause for the arrest; and [even if not] (2) whether it is *reasonably arguable* that there was probable cause for the arrest – that is, whether reasonable officers could disagree as to the legality of the arrest such that the arresting officer is entitled to qualified immunity."[71]

Bartlett was arrested for disorderly conduct, a misdemeanor under AS 11.61.110. Troopers are authorized by AS 12.25.030(a)(1) to arrest a person who commits a crime in their presence. Because Bartlett engaged in disorderly conduct in their presence, the troopers had statutory authority to arrest him.

Numerous facts collectively known to the troopers and that cannot be credibly disputed include:

1. Troopers were investigating underage drinking at a late-night party where alcohol use was widespread;

2. Trooper Weight was alone and speaking with a minor;

3. Bartlett approached Trooper Weight;

4. Bartlett got within arm's reach of Trooper Weight;

5. Bartlett interjected himself into Trooper Weight's investigation and demanded he stop speaking with the minor;

6. Bartlett's conduct interfered with Trooper Weight's investigation;

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[71] *Rosenbaoum v. Washoe County*, 663 F.3d 1071, 1076 (9th Cir. 2011) (emphasis in original and internal citations omitted).

7. Bartlett was loud, had consumed alcohol, and possessed alcohol;

8. Bartlett's right hand was free and near Trooper Weight;

9. Trooper Weight found that reasoning with Bartlett was futile;

10. Trooper Weight felt threatened by Bartlett;

11. Sgt. Nieves saw Bartlett approach Trooper Weight and believed that Bartlett intended to fight to a lone trooper;

12. Sgt. Nieves had prior contact with Bartlett and knew him to be intoxicated, aggressive, and hostile;

13. Sgt. Nieves saw Trooper Weight move Bartlett away;

14. Arctic Man is in a remote location with thousands of campers and a limited number of first responder troopers and AST cautions troopers about increased public and officer safety risks.

Based on even a few of the above facts, probable cause existed to arrest Bartlett for disorderly conduct and also to charge him with other crimes such as harassment and assault. The test for probable cause is whether, under the totality of circumstances known to the arresting officers, a prudent officer could have believed that the suspect had probably committed a

crime.[72] Evidence does not have to be conclusive of guilt.[73] Probable cause does not demand any showing that an officer's belief is correct or more likely than not true.[74] Police officers are not required to articulate all reasons for an arrest because to require that improperly invokes the motivation of the arresting officer.[75] And probable cause may exist for an offense unrelated to the charged offenses.[76]

A. Probable cause supports Bartlett's arrest for disorderly conduct.

Disorderly conduct occurs under AS 11.61.110(a)(6) when a person recklessly creates a hazardous condition for others with no legal justification or excuse. Probable cause to arrest Bartlett existed if a reasonable officer could have believed that Bartlett had recklessly created a hazardous condition for others. While no Ninth Circuit case has been found addressing Alaska's

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[72] *See, e.g., Luchtel v. Hagemann*, 623 F.3d 975, 979 (9th Cir. 2010); *United States v. Hoyos*, 892 F.2d 1387, 1392 (9th Cir. 1989)(*citations omitted*) (recognizing probable cause may be based on the collective knowledge of all of the officers involved).

[73] *Garcia v. County of Merced*, 639 F.3d 1206, 1209 (9th Cir. 2011).

[74] *Id.; see also, Caldwell v. Porch*, 2014 WL 1921013 , *6 (C. D. Ca. 2014) (quoting *Texas v. Brown*, 460 U.S. 730, 742 (1983) and citing *Maryland v. Pringle*, 540 U.S. 366 (2003)(practical considerations of everyday life control what reasonable and prudent men – not legal technicians – act).

[75] *Devenpeck v. Alford*, 543 U.S. 146, 153-155 (2004).

[76] *Id.* Additional facts relevant to the resisting arrest charge are detailed in subpart D.

disorderly conduct statute or precisely these facts, an often-cited Seventh Circuit case affirmed the district court's dismissal of false arrest and malicious prosecution claims against an officer who arrested an individual who shouted at her, waved his arms, swore, and impeded her ability to complete a tow report.[77] Relevant factors included that it was late, the officer was alone and concerned for her safety, and the individual was intoxicated.[78] The court concluded that the officer had probable cause to charge the plaintiff for obstruction and also for the uncharged crime of disorderly conduct.[79] The court, referencing decisions from other circuits, and also recognizing that qualified immunity gives officers leeway to charge for disorderly-conduct-related offenses, found that the officer's justifications for the arrest were neither 'novel' nor 'extravagant.'[80]

So too here, Bartlett yelled and impeded Trooper Weight's ability to do his investigation. Trooper Weight tried to explain what he was doing but Bartlett continued to be disruptive. Beyond that, Trooper Weight believed that Bartlett would assault him and conveyed that belief – through actions and words– to Sgt. Nieves. Troopers knew Bartlett was drunk and

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[77] *Biddle v. Martin*, 992 F.2d 673, 674 (7th Cir. 1993).

[78] *Id. See also Currier v. Baldridge*, 914 F.2d 993, 996 (7th Cir. 1990)(even service of legal papers on a police officer in a courtroom would tend to provoke a disturbance giving officer probable cause to arrest).

[79] *Id.* at 676.

[80] *Id.* (citations omitted).

they believed that he was hostile. These are neither novel nor extravagant reasons to arrest Bartlett for disorderly conduct.

B. Probable cause existed to arrest Bartlett for harassment.

Under Alaska law, a person commits second degree harassment if, with intent to harass or annoy another, that person insults, taunts, or challenges another in a manner likely to provoke an immediate violent response. See AS 11.61.120(a)(1). No dispute exists here that Bartlett approached Trooper Weight while he was interviewing a minor and that Bartlett loudly and in close proximity demanded that Trooper Weight stop interviewing the minor.[81] Trooper Weight could smell alcohol on Bartlett's breath. A prudent officer could believe that probable cause existed that Bartlett had committed harassment because he intended to annoy Trooper Weight by challenging or taunting him to stop speaking with the minor through his demands, his loud voice, and his close physical presence. Beyond those facts, Bartlett's right hand was free and near Trooper Weight and Sgt. Nieves heard Trooper Weight tell Bartlett to get back and saw him push Bartlett back.[82] An officer witnessing Trooper Weight's defensive action could reasonably conclude that Bartlett had challenged or taunted Weight, provoking the response. The question is not the troopers' or Bartlett's subjective intent, but whether a reasonable police officer could

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[81] First Amended Complaint, para. 4 "Bartlett advised Weight of his belief that Weight should not be interviewing the minor . . . ."

[82] Ex. D, [Tr. 93:18-94:9].

believe there was a fair probability that Bartlett's conduct amounted to harassment in violation of AS 11.61.120(a)(1). The answer is yes.

C. Probable cause existed to arrest Bartlett for assault.

A person commits fourth-degree assault if, by words or conduct, that person recklessly places another person in fear of imminent physical injury. AS 11.41.230(a)(3). A person commits fourth-degree assault if he recklessly by words or conduct places another in fear of imminent physical injury. Intoxicated people often act unpredictably and Trooper Weight said Bartlett's conduct caused him to fear imminent physical injury. Bartlett's friend, David Krack, agreed that a trooper could have felt threatened by Bartlett's conduct, though trying to limit that to "different circumstances."[83] But conduct in the eyes of the untrained may convey entirely different messages than it does to the experienced police officer.[84] Krack ignores the potential danger to an officer when an unknown man, reeking of beer, stands close enough to touch the officer who is at that point alone working at a crowded outdoor event. Krack's perspective was wholly different from the troopers' perspectives in other ways as well, including that Krack was, by his own admission, too drunk to safely drive.

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[83] Ex. E, [Tr. 34:23-35:3].

[84] *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1021 (9th Cir. 2009)(citing *United States v. Bernard*, 623 F.2d 551, 560 (9th Cir. 1980).

The KTVA video shows that Bartlett was near Trooper Weight and within striking distance. This could heighten the perceived threat to anyone Bartlett confronted. The high-resolution portion shows that Bartlett's right hand was free and near Trooper Weight. It would be reasonable to assume that Bartlett was right-hand dominant (he was). Bartlett outweighed the lone trooper.[85] In addition, Sgt. Nieves' observations as he approached provide an independent basis for probable cause. A reasonable officer hearing and seeing Trooper Weight's defensive response to Bartlett could reasonably conclude that Bartlett's conduct caused Trooper Weight feel threatened. Sgt. Nieves may rely on his own perceptions, which included hearing Trooper Weight order Bartlett back and then seeing Trooper Weight's defensively move Bartlett.[86] Based on the totality of circumstances, probable cause to arrest Bartlett existed under AS 11.41.230(a)(3) for placing Trooper Weight in fear of imminent physical injury.

D. Probable cause existed to arrest Bartlett's for resisting.

A person commits the crime of resisting arrest under AS 11.56.700(a)(1) when he uses force to resist an arrest by a police officer, with the intent of preventing the arrest, or under AS 11.56.700(a)(3) by using any other means that creates a substantial risk

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[85] Ex. F, [Tr. 20:6-10]; Ex. G, ¶ 4.

[86] *Moscoso v. City of New York*, 92 F.Supp.2d 310, 313 (S.D.N.Y. 2000)(officer is entitled to believe either competing plausible version of events).

of physical injury to any person.[87] Under Alaska law, the offense of resisting arrest does not hinge on defining the precise moment a defendant is under arrest.[88] And "effecting an arrest" is described as a process with a beginning and an end, which may be brief and quick or may occur over a period of time.[89] When Sgt. Nieves, a uniformed trooper, first took Bartlett's left arm and ordered him to get back and to get down, he could reasonably believe that Bartlett was aware that he was being arrested. It is not necessary that an officer expressly state the words "you are under arrest."[90] A suspect's awareness can be inferred from surrounding circumstances. In fact, Bartlett's immediate response was to attempt to pull his left arm away from Sgt. Nieves's grip.[91] That attempt supports an inference that Bartlett knew he was being arrested.[92]

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[87] Bartlett was charged under subsection (1) of the statute, but qualified immunity applies if probable cause exists for an offense unrelated to the charged offenses. *Devenpeck v. Alford*, 543 U.S. 146, 153-155 (2004).

[88] *Fallon v. State*, 221 P.3d 1016, 1019 (Alaska App. 2010).

[89] *Id.* at 1020.

[90] *Jones v. State*, 11 P.3d 998, 1001 (Alaska App. 2000); *People v. Hamm*, 6803 N.Y.S. 2d 21, 23 (A.D. 1998).

[91] Ex. H; Ex. N.

[92] *See, e.g., State v. Wilson*, 169 P.3d 1184, 1197 (N.M. App. 2007)(evidence that defendant pulled away when officer attempted to cuff him was sufficient to prove that defendant knew he was being arrested).

Trooper Weight then stepped forward and took Bartlett's right arm, which is added support for an inference that Bartlett knew that he was being arrested. The video screen shot that the ADA created for possible use in the criminal trial shows this.[93]

Bartlett admits that he refused to follow troopers' commands.[94] Not only did Bartlett refuse to follow commands to go immediately to the ground, but he also pulled and tensed his arms and body throughout the arrest.[95] Bartlett admitted that he (Bartlett) controlled the takedown.[96] As Bartlett went to his knees, he pushed his body up against the troopers' downward pressure, resisting the downward force. His head came close to the troopers' heads during the process. The troopers were "holding on for everything [they had]."[97] KTVA reporter John Thain described Bartlett's conduct as "resisting."[98]

The Alaska Court of Appeals upheld a conviction for resisting based in part on an individual bracing his knees against the wall to push his body back against

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[93] Ex. H; Ex. N.

[94] Plaintiff's Motion for Partial Summary Judgment, Dkt. 39, p. 5.

[95] Defendants incorporate any additional arguments and evidence presented in their Opposition to Plaintiff's Motion for Summary Judgment, Dkt. 44.

[96] Ex. F, [Tr. 80:18-23].

[97] Ex. D, [Tr. 77, 14-18].

[98] Ex. I, [60: 2 – 11].

the arresting officer.[99] Similarly, Alaska courts have held that an arrestee's conduct that involved "tensing of arms and pressing them against his body was not "mere non-submission" to an arrest and could constitute resisting arrest under AS 11.56.700(a)(1). Bartlett's conduct was nothing like the cowering non-submission that cannot support a resisting conviction under state law. Bartlett yelled at Sgt. Nieves, obviously pulled his arms away from the troopers, swung his arms across his body, and brought his head near theirs. Federal courts have held that even "natural" reactions to a push or shove may constitute resistance.[100] Probable cause existed to charge Bartlett with resisting arrest.[101]

E. Bartlett's conduct – not his speech – caused his arrest.

Bartlett alleges that the officers arrested him for asserting his First Amendment rights. He is wrong. Troopers arrested Bartlett based on his physical act of confronting Trooper Weight, interfering with an ongoing investigation, and for putting Trooper Weight in fear of assault. Bartlett's right hand was near

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[99] *Velarde v. State*, 353 P.3d 355, 359 (Alaska App. 2015).

[100] *Crumley v. City of St. Paul*, 324 F.3d 1003, 1008 (8th Cir. 2003 (citations omitted).

[101] Probable cause or arguable probable cause existed to charge and arrest Bartlett for harassment, disorderly conduct, and assault, for his conduct after the troopers took his arms. *See e.g*, Exh. M, Order and Opinion dated January 5, 2016, *Klecka v. Cox*, 3:14-CV-00129 JWS (arrestee charged with similar behavior during arrest was tried for disorderly conduct).

Trooper Weight and heightened Trooper Weight's concerns. Because Bartlett's conduct was criminal, any tangential communicative element does not protect the conduct from prosecution.[102] When a person's words go beyond "'verbal criticism, into the realm of interference [with an officer's performance of his or her] duty,'" the Fourth Amendment does not preclude criminal charges.[103] Moreover, an officer's subjective motivation – even if motivated by a suspect's speech – does not invalidate an objectively justifiable arrest under the Fourth Amendment. An arresting officer's state of mind is not material to the existence of probable cause, as long as his actions, viewed objectively, are justified.[104]

II. Qualified immunity bars Bartlett's false arrest claims.

If the court finds that probable cause to arrest Bartlett existed, the second step of the analysis is unnecessary. Alternatively, the court may start with

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[102] *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)(rejecting suggestion that constitutional freedom of speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute).

[103] *Arias v. Amador*, 61 F.Supp.3d 960, 972 (9th Cir. 2014) (brackets in original) (citations include *People v. Green*, 51 Ca.App. 4th 1433, 1438 (1997) (attempts to intimidate the suspected victim into denying the commission of the offense impeded the officer's investigation and thus were not protected by the First Amendment.)).

[104] *Whren v. United States*, 517 U.S. 806, 812-13 (1996).

the second step of the analysis.[105] The second part of the qualified immunity test requires this analysis: whether an officer could reasonably but mistakenly conclude that Bartlett's arrest complied with the Fourth Amendment. An officer might be mistaken but entitled to qualified immunity for several reasons. The officer may be unaware of existing law and how it should be applied.[106] The officer may misunderstand facts about the case and assess the legality of his conduct based on those mistakes.[107] Stated another way, "[t]he issue for immunity purposes is not probable cause in fact but *arguable* probable cause."[108]

To determine whether the contours of an allegedly violated right were clear enough to provide notice to a reasonable official that he was violating that right, courts look at all available decisional law, including the law of other circuits, district courts, and state courts.[109] Unpublished decisions may "inform" the analysis.[110]

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[105] Arguments made in first step of the analysis are incorporated in the second step.

[106] *Saucier v. Katz*, 533 U.S. 194, 205 (2001); *Butz v. Economou*, 438 U.S. 478, 507 (1978) (qualified immunity protects mistakes in judgment, whether the mistake is one of fact or one of law.").

[107] *Id.*

[108] *Smithson v. Aldrich*, 235 F.3d 1058, 1062 (8th Cir. 2000).

[109] *Id.*; *Sorrels v. McKee*, 290 F.3d 965, 970-71 (9th Cir. 2002).

[110] *Sorrels* 290 F.3d at 971. Defendants interpret *Sorrels* to permit reference to relevant unpublished decisions in the second prong of the qualified immunity analysis. Otherwise, Rule 36-6 permitting citation to unpublished decisions after 2007 is followed.

Nieves and Weight are entitled to qualified immunity even if Bartlett's arrest was unreasonable and therefore unconstitutional because their belief that Bartlett's arrest was lawful was objectively reasonable – and *arguable* probable cause existed.[111] And even where officers of reasonable competence disagree on the issue, immunity should be recognized.[112]

While no Ninth Circuit cases were found addressing the exact context here, and disorderly conduct statutes vary, the Ninth Circuit affirmed a jury verdict convicting an individual whose conduct closely mirrored Bartlett's.[113] The conduct occurred in a National Park and included the individual running within a foot or two of a fisherman pointing his finger at him causing the fisherman to feel threatened.[114]

The Ninth Circuit upheld qualified immunity for a police officer's arrest of an individual who stood so close that the officer felt "flecks of spit on his face," while the suspect yelled, pointed at the officer, and waved his

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[111] *Anderson v. Creighton*, 483 U.S. 635, 644 (1987) (noting that the court has frequently observed that determining whether particular searches or seizures comport with the Fourth Amendment is difficult).

[112] *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

[113] *United States v. Dearing*, 1989 WL 37216 (C.A. 9, April 12, 1989) (reviewing 36 C.F.R. 2.34(a)(2) and determining that section 2.24(a)(2)was intended to prohibit disorderly conduct where public alarm might arise).

[114] *Id.* at * 1.

hands.[115] The court noted that the conduct interfered with the officer's duties and a "reasonable officer could have concluded [the] conduct alone constituted an 'insult, taunt, or challenge'" under the harassment statute.[116] In another case, the Ninth Circuit found probable cause to arrest individuals who had put their hands near an officer's face after refusing to disperse.[117] The court emphasized the officer's legitimate interest in maintaining order and control at a crowded outdoor festival.[118] And a federal district court in the Ninth Circuit recently held that qualified immunity applied to claims stemming from the arrest of a woman who closely approached officers.[119] And in a very factually similar case, a man was arrested and charged with disorderly conduct after he approached an officer at a fast pace, stepped towards the officer leaving little space between, resulting in the officer pushing him to create more space.[120]

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[115] *Locricchio v. Richards*, 1996 WL 478703 *3 (C.A. Aug. 22, 1996) (affirming officer's qualified immunity for arrest).

[116] *Id.*

[117] *Gomez v. City of Whittier*, 2006 WL 3456499 *1 (C.A.9, Nov. 30, 2006).

[118] *Id.*

[119] *Kalb v. City of Oceanside*, 2013 WL 1316674 *7 (S. D. Cal. March 29, 2013)(emphasizing that qualified immunity shields officials from harassment, distraction, and liability *citing Pearson v. Callahan*, 555, U.S. 223, 231 (2009)).

[120] *Portillo v. Montoya*, 170 Fed. Appx. 453, 454, 456 (9th Cir. 2006) (police officer entitled to qualified immunity in §1983 excessive

These cases are consistent with the Seventh Circuit decision *Biddle v. Martin*, which, as discussed above, involved the arrest of the individual who shouted at an officer and impeded the officer's ability to complete a report.[121] To reiterate, the court found that the officer's justifications for the arrest were neither 'novel' nor 'extravagant' and concluded that qualified immunity gives officers leeway to charge for disorderly-conduct-related offenses.[122]

In addition to authority to arrest Bartlett for disorderly conduct under (a)(6) of 11.61.110, *arguable* probable cause existed to arrest Bartlett for being unreasonably loud in violation of AS 11.61.110(a)(1), given that Trooper Weight found that reasoning with Bartlett was futile and it is undisputed that Bartlett was close and loud. The time, place, and manner that Bartlett used his loud voice – a few feet at most from Trooper Weight – interfered with Trooper Weight's investigation. Similarly, *arguable* probable cause would

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force claim where he used pepper spray on hostile suspect and struck arrestee's thigh with his flashlight during arrest).

[121] *Biddle v. Martin*, 992 F.2d 673, 674 (7th Cir. 1993); *cf*, *Crawford v. Kemp*, 139 P.3d 1249 (Alaska 2006)(Alaska Supreme Court emphasizes the importance of identifying who initiates the contact and who is in the dominant position in a disorderly conduct case involving a trooper. *Crawford* was decided when the Alaska Supreme Court applied only part of the federal qualified immunity analysis. Two years after *Crawford*, the court issued *Sheldon v. City of Ambler*, 178 P.3d 459, 464 (Alaska 2008), which recognized that its prior qualified immunity analysis failed to apply step two of the federal test. Reviewed in total, state law on disorderly conduct is not clearly established.

[122] *Id.* at 676.

support criminal charges against Bartlett for harassment or assault even if the troopers mistakenly believed that Bartlett was challenging, taunting, or about to hit Trooper Weight because those would be wholly reasonable mistakes under the circumstances here involving a drunk's out-of-the-blue confrontation of a lone trooper engaging in an investigation at a late-night crowded outdoor party.

Trooper Weight and Sgt. Nieves are entitled to qualified immunity on Bartlett's false arrest and false imprisonment claims.

III. Troopers used reasonable force to secure and arrest Bartlett.

The Fourth Amendment precludes the use of force that exceeds objective standards of reasonableness.[123] Determining whether the use of force was reasonable requires careful attention to the facts of each particular case and a careful balancing of an individual's liberty interest with the government's interest.[124] When the force used is objectively reasonable, any argument that the force used was motivated by speech fails.[125]

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[123] *Wilkins v. City of Oakland*, 350 F.3d 949, 954 (9th Cir. 2003) (citing *Graham v. Connor*, 490 U.S. 386, 388 (1989)).

[124] *Deorle v. Rutherford*, 272 F.3d 1272, 1279-81 (9th Cir. 2001).

[125] *Blackmore v. City of Phoenix*, 2005 WL 270331, *2 (9th Cir., Feb. 3, 2005) (rejecting plaintiff's argument that force used was motived by his speech because the takedown was objectively justified - plaintiff was part of a large crowd that refused to disperse).

Objective reasonableness is judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.[126] "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split second judgments in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation."[127] "Not every push or shove, even if it may seem unnecessary in the peace of the judge's chambers ... violates the Fourth Amendment."[128]

The Ninth Circuit underscores the breadth of the acceptable range of an officer's conduct in a rapidly evolving situation: "an officer cannot be expected to accurately anticipate all of the possible responses a subject may have to his commands and then tailor his actions accordingly in order for his conduct to fall in the category of what is considered reasonable."[129] In rapidly evolving situations, the Ninth Circuit has rejected arguments that officers should have used less-intrusive alternatives because that would involve the courts in "endless second-guessing."[130] Courts have recognized a "substantial government interest in

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[126] *Graham v. Connor*, 490 U.S. 386, 396 (1986).

[127] *Id.* at 396-97.

[128] *Id.* at 396.

[129] *Walker v. City of Fresno*, 2011 WL 5554305 * 11 (E.D. Cal., November 15, 2011). 1996).

[130] *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994).

promoting public safety in situations involving crowds.[131]

A. Trooper Weight moved Bartlett back to create a safer distance.

The facts in this case are appropriate for an entry of summary judgment in favor of Trooper Weight for his single push. Trooper Weight did not know Bartlett or why he was trying to stop the investigation. Because Bartlett was so close to Trooper Weight, the trooper could not timely react if Bartlett assaulted him.[132] In accordance with his training, Trooper Weight placed his open hands on Bartlett's chest and pushed him once to safely move Bartlett back and to prevent a sudden assault.[133]

Officers routinely want a person to be far enough away to minimize the officer's vulnerability.[134] When a person is close, the officer has less reaction time.[135] A reasonable officer could believe that in a situation involving an unpredictable drunk and a shortened reaction time, the drunk has the advantage.[136] Trooper Weight's push minimized Bartlett's advantage and

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[131] *Brayshaw v. City of Burlington*, 2015 WL 1523019, *9 (D. Vt., April 3, 2015).

[132] Ex. G, ¶ 4.

[133] Ex. G, ¶ 4.

[134] Ex. K, ¶ 1, report pp. 9-10.

[135] Ex. K, ¶ 1, report pp. 9.

[136] Ex. K, ¶ 1, report pp. 9.

prevented the need for the use of more force had Bartlett's conduct escalated.

The Ninth Circuit has found no Fourth Amendment violation occurred where officers pushed and chemically sprayed a female who interfered with an officer responding to a large outdoor party involving alcohol.[137] Bartlett similarly interfered with Trooper Weight's investigation and Trooper Weight quickly perceived Bartlett to be an immediate threat and used his open palms to administer a single push. No one was hurt. No weapons were used. No punching, kicking or knee strikes occurred and it is hard to conceive of a better example of restraint. Trooper Weight's contact is exactly the type of "push or shove" that does not violate the Fourth Amendment.

No cases have been found clearly establishing that a single open-handed push is too much force when used in this context. To the contrary, several decisions give police officers qualified immunity in similar circumstances. The United States Supreme Court, for example, affirmed the grant of qualified immunity where an officer shoved a suspect into a police van after the suspect approached the Vice President.[138]

In a case factually similar to Bartlett's case, a man named Portillo was charged with disorderly conduct after he approached a police officer at a fast pace and stepped towards the officer, leaving very little space

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[137] *Jackson v.City of Bremerton*, 268 F.3d 646, 649-50 (9th Cir. 2001).

[138] *Saucier*, 533 U.S. at 209.

between the two of them.[139] When the officer pushed Portillo to create more space, Portillo clenched his fists and refused to calm down.[140] The confrontation attracted a crowd and the officer was concerned that violence would erupt so he pepper sprayed Portillo.[141] The officer also struck Portillo with a flashlight several times in the thigh while making the arrest, but no serious injury was claimed. The Ninth Circuit upheld the grant of qualified immunity. Trooper Weight responded to Bartlett's proximity to him the same the way the police officer responded to Portillo – by moving him back to create space. The troopers did not have to resort to pepper spray or flashlight strikes to effect Bartlett's arrest, they merely threatened to use a taser.

Another supporting case involves a police officer who had arrested a drunken man after a bachelor party.[142] The bachelor, Sorgen, followed the officer as he escorted the arrestee. When Sorgen approached the officer within arm's distance, the officer, in an effort to move him back, pushed Sorgen on his chest using open palms. Although Sorgen moved back slightly, he stood his ground, at which point the officer used a baton and struck him three or four times on his lower body, causing him to fall. Other than bruises, Sorgen was not

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[139] *Portillo v. Montoya*, 170 Fed. Appx. 453, 454, 456 (9th Cir. 2006).

[140] *Id.* at 456.

[141] *Id.*

[142] *Sorgen v. San Francisco*, 2006 WL 2583683 (N.D. Cal).

injured. The court readily found the officer was entitled to qualified immunity.

The facts are even more compelling here. Bartlett did not steadily advance within arm's length; he immediately got that close. Trooper Weight responded exactly the way the police officer initially responded to the bachelor in *Sorgen* – by using open palms to physically move the aggressor back. Trooper Weight did not use a baton strike like the officer did in the bachelor case. Sgt. Nieves' quick response to assist Trooper Weight diffused the need for baton strikes or OC spray.

The Ninth Circuit granted two officers qualified immunity when each pushed a female at different times during an encounter.[143] The first officer used a single push to move her away when she got too close to the officer during another's arrest.[144] The second officer pushed the woman down a stairwell, causing her to fall onto one knee while he was trying to quickly escort her out of the building.[145] Again, she was not injured.[146]

Similarly, the Eighth Circuit found that an officer in the process of an investigation did not use excessive force by pushing a female attorney who approached a

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[143] *Jimenez v. City of Costa Mesa*, 174 Fed. Appx. 399 (9th Cir. 2006).

[144] *Id.* at 402 (citing *Graham v. Conner*'s "not every push" language).

[145] *Id.* at 404.

[146] *Id.* (*citing Jackson v. City of Bremerton*).

passenger in a parked vehicle to give that person a business card. Although the attorney, who was acquitted for obstruction, argued that she was unnecessarily pushed, the court found that the complete absence of injury suggests that excessive force was not used.[147]

Several single-push cases found involve women being pushed by male police officers. Even where women were involved, the male officers were entitled to qualified immunity. By contrast, Bartlett is a large heavy-set male who (like the bachelor), had been drinking all night. When pushed, Bartlett did not drop his beer and was not injured. He was simply moved back. And even where an officer reasonably, but mistakenly, believed a suspect was likely to assault him or fight back, the officer would be justified in using more force than in fact was needed.[148] Trooper Weight's controlled single push is an exemplary use of restraint under the circumstances.

B. Troopers used reasonable force to arrest Bartlett.

Upon seeing Bartlett confront Trooper Weight and Trooper Weight's defensive single push, Sgt. Nieves immediately moved in to arrest and secure Bartlett. The authority to arrest "necessarily carries with it the

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[147] *Crumley v. City of St. Paul*, 324 F.3d 1003, 1007-1008 (8th Cir. 2003); *Jennejahn v. Village of Avon*, 575 F.Supp.2d 473, 480-81 (W.D. N.Y. 2008) (grabbing, pushing, pulling, spinning, pushing during pat down of 65-year old does not rise to level of a constitutional violation).

[148] *Saucier*, 533 U.S. at 201.

right to use some degree of physical coercion or threat thereof to effect it."[149] State law expressly permits police officers to use reasonable force to complete an arrest.[150] Whether the force was reasonable requires examination of a variety of factors, including the degree of force used and the threat posed by the suspect to the officer or others.[151] An objectively reasonable officer approaching could believe – as Sgt. Nieves did – that Bartlett had threatened or harassed Trooper Weight. An objectively reasonable officer, with the knowledge Sgt. Nieves had that Bartlett was drunk and hostile, could believe officers would face an even more volatile situation if Bartlett was not quickly arrested and the situation quickly contained.

To arrest Bartlett, Sgt. Nieves took Bartlett's left arm, instructing him to back up and then to get down. Trooper Weight then stepped forward to take Bartlett's right arm and the troopers worked together to accomplish a controlled takedown. The goal of a controlled takedown (i.e., a takedown executed so as to produce only minimal injury) is to quickly gain control of an individual who poses a risk to the troopers or who resists.[152] The edited KTVA video shows Bartlett tensing his arms and yelling, albeit with Bartlett's profanities edited out. The troopers attempted to use a

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[149] *Graham v. Connor*, 490 U.S. 386, 396 (1986).

[150] Alaska Statute 11.81.370.

[151] *Graham*, 490 U.S. at 396.

[152] Ex. K, ¶1, report p. 11; *Sheridan v. Trickey*, 2010 WL 5812678, *8 (D. Oregon, Dec. 16, 2010) citing *Gregory v. County of Maui*, 523 F.3d 1103, 1106-07 (9th Cir. 2008).

leg sweep to bring Bartlett down, but that did not work immediately. During this process, Bartlett tensed his arms and pushed upward against the troopers' downward pressure and went to the ground gradually.

In *Jackson v. City of Bremerton*, police encountered an outdoor crowd and a defiant arrestee.[153] Officers were granted summary judgment when they allegedly struck, tackled, and restrained the plaintiff during handcuffing. Officers also used a "chemical irritant" and roughly pulled the arrestee to her feet. The court emphasized that qualified immunity is appropriate for tense circumstances in which officers must make on-the-spot judgment calls.[154] In *Jackson*, the alleged injuries were minor. Here, Bartlett had no injuries – zero. And unlike the *Jackson* scenario, no "chemical irritant" was used. Like *Jackson*, this case involved on-the-spot judgment calls.[155]

Even if this Court finds that the minimal force used to arrest Bartlett violated the Fourth Amendment, it was not clearly established that the troopers' actions in restraining Bartlett and safely taking him to the ground in this context violated Bartlett's constitutional rights. *Jackson*, which involved the use of more force, supports qualified immunity here.

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[153] 268 F.3d 646, 652 (9th Cir. 2001).

[154] *Id.* at 651.

[155] The KTVA reporter who filmed Bartlett's arrest said that, based on what he observed, his new story focus was that troopers were working to keep people safe – not that troopers had used excessive force. Ex. I, [Tr. 24:16-21, 53:8-25].

Similarly, qualified immunity protected a police officer who used more force to arrest a photojournalist who illegally crossed a barrier tape.[156] The officer forced the journalist to the ground twice while making the arrest.[157] Qualified immunity also protected an officer's take-down of an individual arrested for wrongful possession of a driver's license when the individual interfered with a valid investigation[158] And an officer who used pepper spray and flashlight strikes on a man who aggressively approached him and resisted arrest was entitled to qualified immunity.[159]

Bartlett undisputedly interfered with Trooper Weight's investigation. And Trooper Weight believed an assault was imminent. Thus, troopers were justified under the Fourth Amendment to use more force than they did to make Bartlett's arrest. Bartlett's lack of injury signals that the force used was reasonable.[160] Courts addressing similar takedowns that resulted in actual injuries have applied qualified immunity for

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[156] *Liiv v. City of Couer D'alene*, 2005 WL 902052 (C.A. 9 Idaho).

[157] *Id.* at *2.

[158] *Bennett v. Gow*, 2009 WL 2906007 (C.A.9 Wash).

[159] *Portillo*, 170 Fed. Appx. at 456.

[160] *Crumley*, 324 F.3d at 1008 (officer pushed or shoved woman multiple times did not use excessive force; absence of injury suggests force used was reasonable).

reasonable mistakes of fact.[161] These include the mistaken belief that a suspect is likely to fight back necessitating a take down and the mistaken belief that a takedown could be executed in a way that minimizes harm.[162] The troopers' actions here were a model of restraint and no one was hurt; they are entitled to qualified immunity and summary judgment on Bartlett's use of force claim.

Finally, to the extent that Bartlett alleges excessive force was used in handcuffing him, that claim also fails. The troopers do not recall whether they cuffed Bartlett. If they did, they used a standard cuffing technique and at no time did Bartlett complain or appear uncomfortable[163] In fact, Bartlett testified that his cuffs did not become uncomfortable until he was in the holding tent.[164] When Bartlett asked the Judicial Services Officer to uncuff him, the officer immediately moved Bartlett's hands to his front.[165] Up to that point Bartlett had not told any other trooper that his cuffs hurt.[166] No medical attention was requested or

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[161] *Brayshaw v. City of Burlington*, 2015 WL 1523019 (D. Vt.)(analyzing takedown of drunk after his removal from line at hot dog stand on New Year's Eve).

[162] *Id.*

[163] Ex. A, ¶ 7; Ex. G, ¶ 11.

[164] Ex. F, [Tr. 31: 3- 10].

[165] Ex. F, [Tr. 31: 11 – 14].

[166] Ex. F, [Tr. 30: 13-25, 31: 1-4].

required.[167] Ninth Circuit law precludes excessive force claims for tight handcuffs under these circumstances.[168]

IV. Bartlett's malicious prosecution claim is barred.

A. Probable cause and no Fourth Amendment seizure preclude claims.

Although Bartlett alleges that he was maliciously charged and prosecuted in violation of numerous constitutional provisions,[169] the Supreme Court has stated that the appropriate vehicle for a § 1983 malicious prosecution claim is the Fourth Amendment.[170] The Ninth Circuit recognizes that a § 1983 malicious prosecution claim is a hybrid claim involving state law elements of malicious prosecution and the Fourth Amendment.[171] Under Alaska law, the elements of a cause of action for malicious prosecution are that the proceeding (1) was initiated with malice, (2) lacked probable cause, and (3) terminated in favor

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[167] Ex. F, [Tr. 31: 15- 24].

[168] *See e.g., Hupp v. City of Walnut Creek*, 389 F.Supp.2d 1229, 1232-33 (N.D. Cal. 2005) (summarizing Ninth Circuit law and rejecting a tight handcuffing claim where plaintiff failed to demonstrate that complaints were ignored).

[169] First Amended Complaint, ¶ 23.

[170] *Albright v. Oliver*, 510 U.S. 266, 274 (1994); *see also, Sanders v. San Diego*, 93 F.3d 1423 (9th Cir. 1996) (in the criminal context, the Fourth Amendment provides the standard for determining whether due process has been met) (*citations omitted*).

[171] *Id.*

of plaintiff.[172] Troopers are entitled to qualified immunity for Bartlett's § 1983 malicious prosecution claim because they had probable cause to charge Bartlett with various crimes identified above or arguable probable cause, which will not be repeated here. Beyond those arguments, for a state actor to violate the Fourth Amendment by initiating a prosecution, the criminal charges must have caused some deprivation of liberty consistent with the concept of a seizure.[173] Although Bartlett was "seized" for a few hours as a part of his arrest, he was released thereafter on bail conditions.[174]

After his release from Arctic Man, Bartlett asserts a claim for malicious prosecution claim for the months-long prosecution undertaken by the state.[175] But Bartlett's bail conditions do not fit within the Fourth Amendment's definition of a seizure. The Supreme Court has said "[F]rom the time of the founding to the present, the word 'seizure' [under the Fourth Amendment] has meant a 'taking possession.'"[176] A Fourth Amendment seizure "requires an intentional

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[173] *Kollodge v. State*, 757 P.2d 1024, 1026 (Alaska 1988).

[173] *Britton v. Maloney*, 196 F.3d 24, 27 (1st Cir. 1999), *cert. denied* 530 U.S. 1204 (2000) (*citations omitted*).

[174] Ex. L, Response to RFA No. 14; Ex. O. p. 2.

[175] First Amended Complaint, ¶¶ 12, 23.

[176] *California v. Hodari D.*, 499 U.S. 621 (1991) (holding that officer's pursuit of suspect was not a seizure until suspect was tackled); *see Id.* at 629 (Stevens, J., dissenting) (characterizing as "narrow" the Court's seizure definition).

acquisition of physical control."[177] Supreme Court jurisprudence on what constitutes a seizure has typically involved almost complete restriction of movement either physically or a close connection (both temporally and spatially) between the show of authority and compliance.[178] The Court has stated that "[a] seizure is a single act, and not a continual fact."[179] In *Albright v. Oliver*, the Supreme Court left open the question of whether pretrial conditions of release are a Fourth Amendment seizure.[180] Although the concurring opinion in *Albright* suggested that a defendant released prior to trial on the condition that he later appear before the courts may still be seized within the meaning of the Fourth Amendment, courts have split on the issue.[181]

The Ninth Circuit has held that a person is not seized under the Fourth Amendment when he or she is required, by conditions of pretrial release, to obtain permission of the court before leaving the state and to

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[177] *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989).

[178] *See, e.g., Brower v. County of Inyo*, *489 U.S.* at *597*(a Fourth Amendment seizure occurs only when the governmental intentionally terminates of freedom of movement).

[179] *California v. Hodari, D.*, 499 U.S. at 625 (*citation omitted*).

[180] *Albright v. Oliver*, 510 U.S. 266 (1994) (the Court commented at p. 271 that Albright's voluntary surrender to an arrest warrant constituted a seizure, but Albright did not raise the Fourth Amendment and therefore further analysis was not undertaken).

[181] *Id.* at 279 (Ginsberg, J., concurring); *see*, e.g., *Nieves v. McSweeney*, 241 F.3d 46, 55-56 (1st Cir. 2001) (noting several circuits have rejected Justice Ginsberg's theory).

make court appearances."[182] Here, Bartlett's release conditions required only that he obtain written permission from the court before leaving, obey all court orders and federal, state, and local laws, appear in court when ordered, maintain contact with an attorney if he has one, notify his attorney of address changes, and not consume alcoholic beverages.[183] Bartlett only appeared at a few hearings telephonically. To the extent that Bartlett's claims are that his release conditions or the requirement to appear in court and defend the charges infringed on his liberty, such requirements do not rise to the level of a Fourth Amendment seizure.

B. The prosecutor's work on the criminal case immunizes defendants.

Prosecutors have absolute immunity for claims of malicious prosecution. The underlying principle for this immunity is the well-settled belief that prosecutors cannot be held liable for acts related to the judicial process, even if illegal and intentionally harmful, because of the extreme cost to society that would flow

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[182] *Karam v. City of Burbank*, 352 F.3d 1188, 1193 (9th Cir. 2003). See also *Palmer v. Savona*, 2013 WL 4478945 at * 12 -13 (n. 193) (alleged Fourth Amendment violations dismissed based on *Karam* where a summons to appear subject to de minimus release restrictions were imposed); *Fenters v. Chevron*, 2010 WL 5477710 at *21 – 23 (E.D. Ca. Dec. 30, 2010) (dismissing false arrest claim where court appearance requirements do not constitute a seizure under *Karam*).

[183] Ex. O, p. 2.

from subjecting prosecutors to civil liability.[184] The touchstone of absolute prosecutorial immunity developed by several United States Supreme Court cases is whether there is a "functional tie to the judicial process."[185] In the seminal case, *Imbler v. Pachtman*, the Supreme Court held that prosecutors are entitled to absolute immunity for the performance of functions that are "intimately associated with the judicial phase of the criminal process."[186] *Imbler* held the prosecutor immune for acts relating to the knowing use of false testimony and the intentional suppression of exculpatory evidence.

Police officers are entitled to absolute immunity from suits for malicious prosecution when a prosecutor initiates or assumes responsibility for the case prosecution. The "[f]iling of a criminal complaint immunizes investigating officers ... from damages suffered thereafter because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at the time."[187] The Ninth Circuit reaffirmed this principle in a malicious prosecution claim against an investigating officer.[188]

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[184] *Gregoire v. Biddle*, 177 F.2d 579 (2nd Cir. 1949).

[185] *Buckley v Fitzsimmons*, 509 U.S. 259, 277 (1993).

[186] 424 U.S. 409, 430 (1976).

[187] *Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir. 1981), *see also*, *Smiddy v. Varney*, 803 F.2d 1469, 1471 (9th Cir. 1986)(*Smiddy II*), *modified on other grounds*, 811 F.2d 504 (9th Cir. 1987).

[188] *Poppell v. City of San Diego*, 149 F.3d 951, 962 (9th Cir. 1998).

The court explained that the exercise of "prosecutorial judgment will usually insulate investigating officers from liability."[189] "It would be ironic if the presumably independent decisions of [the] immune [prosecutor] would automatically result in enhanced liability for the non-immune police officers."[190] Absolute immunity can only be extinguished when, for example, the police officers exert undue influence to cause the prosecutor to act contrary to his or her independent judgment, or when the officers present knowingly false material evidence to an unwitting prosecutor.[191] It takes more than a plaintiff's account of events to overcome the presumption.[192] And where the prosecutor herself attests that her decision was made independently, that should be considered.[193] Where a prosecutor gathers independent information, her independence is fortified.[194]

Here, the troopers referred Bartlett's case to the district attorney's office. After conducting an initial review of Bartlett's case, Assistant District Attorney

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[189] *Id, citing Smiddy II*, 803 F.2d at 1471.

[190] *Id.*, citing *Smiddy II*, at 803 F.2d at 1472.

[191] *Smiddy*, 665 F.2d at 266-67.

[192] *Newman v. County of Orange*, 457 F.3d 991, 994 (9th Cir. 2006).

[193] *Dupris v. McDonald*, 2012 WL 210722, *8 (D. Arizona January 24, 2012).

[194] *Lasic v. Moreno*, 504 F.Supp.2d 917, 921- 923 (E.D. Ca. 2007).

Raymond Beard accepted it for prosecution.[195] ADA Beard understood that Bartlett claimed that Trooper Weight assaulted him and then covered up that alleged assault by arresting Bartlett.[196] As explained in ADA Beard's affidavit he was not persuaded by Bartlett's arguments.[197] The troopers fully cooperated with ADA Beard and his office and provided information requested.[198] ADA Beard directed the criminal prosecution, which included responding to defense motions, responding to requests for video footage, obtaining that footage, and negotiating with Bartlett's counsel.[199] In fact, ADA Beard has an extensive background in law enforcement and he believes that the KTVA video that he obtained corroborates the troopers.[200]

ADA Beard believes that probable cause existed to charge and prosecute Bartlett for disorderly conduct, resisting arrest, and also with "fear assault" and attempted assault.[201] As the trial date neared, the state's budget issues became a paramount

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[195] Ex. J, ¶ 5.

[196] Ex. J, ¶ 7.

[197] Ex. J, ¶ 7.

[198] Ex. J, ¶¶ 4 - 6.

[199] Ex. J, ¶¶ 6 - 10.

[200] Ex. J, ¶¶ 3, 6.

[201] Ex. J, ¶ 11.

consideration. Ultimately, Bartlett's case was dismissed to avoid travel costs.[202]

In sum, based on the principles enunciated by the Ninth Circuit, ADA Beard's exercise of "prosecutorial judgment" in maintaining the criminal prosecution insulates the investigating officers -Sgt. Nieves and Trooper Weight- and they are entitled to the same absolute immunity that covers the prosecutor. Accordingly, the malicious prosecution claims must be dismissed.

V. Bartlett has no viable due process claim.

Bartlett alleges his right to due process was violated because of the way the troopers investigated his crimes, namely he argues troopers should have seized the KTVA video sooner. Negligent investigation of a crime, however, is not a constitutional claim.[203] And, in the Ninth Circuit, a due process claim against a police officer requires "detentions of (1) unusual length,

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[202] Ex. J, ¶11.

[203] See e.g., *Gomez v. Whitney*, 757 F.2d 1005, 1006 (9th Cir.1985) ("[W]e can find no instance where the courts have recognized inadequate investigation alone as sufficient to state a civil rights claim); *Page v. Stanley*, 2013 WL 2456798, at *8–9 (C.D.Cal. June 5, 2013) (dismissing § 1983 claim that officers failed to conduct thorough investigation of plaintiff's complaints because plaintiff "had no constitutional right to *any* investigation of his citizen's complaint, much less a 'thorough' investigation or a particular outcome"); *Frisch v. City of Eugene*, 2010 WL 686754, at *3 (D. Oregon Feb. 4, 2010)(no statutory or common law right, much less a constitutional right to an investigation). See also, *Carter v. State*, 356 P.3d 299 (Alaska App. 2015) (government has no duty to collect third-party video).

(2) caused by the investigating officers' failure to disclose highly significant exculpatory evidence to prosecutors, and (3) due to conduct that is culpable in that the officers understood the risk to the plaintiff's rights from withholding the information or were completely indifferent to those risks."[204] These factors are to be narrowly applied.[205]

Bartlett was held only a few hours at Arctic Man and released on bail. He was not detained after that.[206] The absence of a post-arrest detention precludes a "due process" claim. Moreover, no "highly significant exculpatory evidence" exists. The KTVA video supports the charges brought. Further, the video was produced in the criminal case, which cures any alleged problem and bars a due process claim.[207]

VI. Conspiracy claims should be dismissed.

Bartlett amended his complaint to assert a conspiracy claim under 42 U. S. C. § 1985, which requires allegations of: 1) a conspiracy, 2) for the purpose of depriving a person or class of equal protection or privileges and immunities; 3) an act in furtherance thereof; and 4) injury or deprivation of

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[204] *Tatum v. Moody*, 768 F.3d 806, 819-20 (9th Cir. 2014).

[205] *Id.* at 819.

[206] Ex. L.

[207] *U.S. v. Gamez-Orduno*, 235 F.3d 453, 461-462 (9th Cir. 2000)(*Brady* violation may be cured by belated disclosure)

rights.[208] The equal protection and privilege and immunities language requires a racial or other class-based discriminatory animus behind the conspiracy.[209] No § 1985(3) conspiracy can be made here because no evidence of a discriminatory racial or class-based animus exists.

VII. No evidence of punitive damages exists.

In light of the troopers' operational directives to protect campers and themselves at Arctic Man, the late party involving widespread alcohol use, and Alaska's endemic problem with alcohol and its impacts on the vulnerable, including minors, no evidence exists to support punitive damages here. No objective evidence of malice exists. Bartlett interfered with an ongoing investigation in a time, place, and manner that drew red flags for the troopers who were more than 50 feet apart at the time. First acting independently and then together they promptly and efficiently arrested Bartlett. No one was hurt. Justice and common sense require dismissal of Bartlett's punitive damage claims.

VIII. Conclusion.

Defendants Nieves' and Weight's actions were consistent with the Fourth Amendment. If they were mistaken about facts or law, those mistakes were

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[208] *Griffin v. Breckenridge*, 403 U.S. 88, 102-103 (1971). Bartlett does not specify in his first amended complaint which subsection under § 1985 he alleges was violated. Subsection (3), however, appears to be the only relevant subsection.

[209] *MacEchern v. City of Manhattan Beach*, 623 F.Supp.2d 1092, 1109 (C. D. Ca. 2009).

reasonable and they are entitled to immunity. Qualified immunity is intended to protect all but the most incompetent officers and those who clearly violate the law. These troopers are not the least bit incompetent – to the contrary, they are excellent troopers whose prompt, decisive actions prevented injuries and are models of restraint. Bartlett's claims should be dismissed in their entirety.

DATED: January 29, 2016.

CRAIG W. RICHARDS
ATTORNEY GENERAL

By: /s/Stephanie Galbraith Moore
Stephanie Galbraith Moore
Senior Assistant Attorney General
Alaska Bar No. 8911063
Department of Law
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-5190
Facsimile: (907) 258-0760
Email: stephanie.galbraith@alaska.gov
Attorney for Defendants Luis A. Nieves and Bryce L. Weight

* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]

Exhibit A

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CIVIL ACTION NO. 4:15-cv-00004-SLG

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
v.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Defendants.	)
	)

DECLARATION OF LUIS A. NIEVES

1. I have over 20 years of law enforcement experience, including law enforcement training with the US Coast Guard, which includes acting as a use of force instructor. I have been with the Alaska State Troopers since 2006 and I have been a Sergeant since 2012. I have worked in various capacities, including DUI enforcement, ABI, and child abuse investigations, and I have worked as a trooper in the bush and as a VPSO oversight trooper. I have completed the homicide investigations course. I have worked as a Sergeant for the Statewide Crisis Negotiations Team. I have worked as a Case Officer for officer involved shootings. I have worked in recruiting and I am currently a Sergeant for

Anchorage Judicial Services at the Nesbett Courthouse. I am a Council member of the Alaska Police Standards Council, and I was very recently elected Vice Chairman of the Council. My deposition has been taken in this case and this declaration has been requested by counsel to supplement that in support of a motion for summary judgment.

2. Thousands of people attend the annual Arctic Man event and the 2014 KTVA report may well be correct that it becomes the "fourth largest city in Alaska" for three days. I have worked at several Arctic Man events and I am familiar with the widespread alcohol use and high levels of intoxication that occur at the event. Camper behavior at night creates significant public safety concerns because campers congregate to drink and party, often all night long and into the next morning. The troopers' mission is to work proactively to prevent significant public safety problems. We remind people to turn on headlights and to slow down, for example. We keep an eye on intoxicated drivers and pedestrians. Prevention of underage drinking is also a priority. The remote location and limited number of troopers and medical personnel increase the public safety risk, including the risk to troopers. Troopers are encouraged to pair up everywhere they go, and pairing us is mandated when troopers enter the beer tent.

3. I was the supervising trooper on the second shift on April 13, 2014, at Arctic Man 2014. On April 13, 2014, I heard some trooper units reporting that minors were observed consuming alcohol, so I went to that location to assist. When I arrived, a large party was underway and I was informed that troopers on scene had contacted several minors and cited them for

underage drinking. I sought to find the source of the alcohol, and I found a beer keg outside of centrally located RV. The keg needed to be moved inside the RV to keep juveniles from accessing the beer. That is also the area where I first encountered Mr. Bartlett. Although he was older than others in the area, I determined that he was not the owner of the RV because I saw that he was wearing a backpack. As I said in my deposition and reports, Bartlett began shouting to the RV owners that they didn't have to let me in or talk with me. During my contact with Bartlett near the RV, I quickly determined that any further interaction with Bartlett could escalate. I believed that Bartlett was highly intoxicated and hostile to troopers. I left the area and walked toward my trooper vehicle.

4. I do not know exactly what the KTVA reporter filmed during my contacts near the RV. I was not focusing on the reporter, who accompanied me for part of my shift. I have no independent recollection of where the reporter was when I was near or inside the RV or what he was doing at the time. I have seen the KTVA video that aired and it shows me at the door of the RV requesting that the beer be moved inside so that juveniles would not be able to access it.

5. From at least 50 feet away as I was entering my vehicle to leave, I saw Bartlett charge toward Trooper Weight and a teen. It appeared to me that Bartlett was taking a fight to a lone trooper. I immediately went to assist. I did not focus on where the reporter was or even if he was with me. Just as I approached, I heard Trooper Weight order Bartlett back and then saw him move Bartlett back. I believed that Bartlett was harassing or threatening Trooper

Weight and that Trooper Weight considered Bartlett to be a threat. It was reasonable in my professional opinion for Trooper Weight to use a single push to move Bartlett back under the circumstances, particularly in light of the potential threat Bartlett posed by being so close and intoxicated. In my experience, including at Arctic Man, intoxicated people are unpredictable.

6. Based on the totality of the circumstances, including my prior contact with Bartlett by the RV, Bartlett's aggressive charge toward Trooper Weight and his stance, and prior Arctic Man arrests with nearby crowds, I decided to arrest Bartlett and to secure him to keep him from physically retaliating. I believed then, and I continue to believe that we had probable cause to arrest Russell Bartlett. I took hold of Bartlett's left arm and repeatedly ordered him to get back and to get on the ground. Bartlett refused to go down on his own. The video at about 2:12 shows Bartlett yelling and resisting. A true and accurate frame shot captured by ADA Ray Beard at about 2:12 is marked attached as Attachment 4, SOA 526.

7. I do not recall whether I assisted in handcuffing Mr. Bartlett. If I did, I would have used standard cuffing technique. At no time during my contact with Mr. Bartlett did he complain that the cuffs were on too tightly or uncomfortable in any way. Nor did Mr. Bartlett request me or any other trooper present at the party location to loosen or adjust his cuffs.

8. Shortly after Bartlett was secured, I informed him that he was going to jail for harassing an officer. At some point shortly after he was secured, I also contacted dispatch and reported that Bartlett was

arrested for challenging a trooper to a fight. time I contacted Trooper Gabe Rich and Trooper Ryan Mau and ordered them to come immediately to the area to assist as I was concerned about crowd control.

9. A true and accurate copy of the supplemental report I prepared is attached hereto as Attachment 1. A true and accurate copy of my April 16, 2014, comments on the use of force report regarding lack of trooper audio due to "poor design" is attached hereto as Attachment 2. My response was directed to Lt. Piscoya's question whether audio existed. I understood this to mean trooper audio. Lt. Piscoya is the overall commanding officer for Arctic Man and had directed me to permit the KTVA reporter to accompany me for part of my shift.

10. When the DA's office contacted me by email in July 2014, I informed them of the presence of a TV news reporter, although I referred to Channel 2 instead of Channel 11. Trooper Miner also responded to the email and cc' d me saying the reporter was from either KTUU or KTVA. A true and accurate copy of the emails exchanged between us and paralegal Sherese Holladay are attached hereto as Attachment 3. This issue came up again in December. At ADA Beard's direction, I served a records subpoena on KTVA for the video.

11. I have seen the KTVA video since Bartlett's arrest. It does not show Bartlett walking toward Trooper Weight. And it only shows a small portion of my walk toward Trooper Weight, the teen, and Bartlett. It does not show my prior contact with Bartlett by the RV. The view of the scene that is depicted is not from the same perspective that I had on the scene, which includes not only what I could see,

hear, and sense, but also my knowledge of Bartlett based on my contact with him moments before he approached Trooper Weight.

12. At no time did I act with malice toward Russell Bartlett. I had no prior contact with Bartlett before I encountered him near the RV. My actions were based on my professional observations at the scene and were based on Bartlett's conduct. Although Bartlett was arguably disorderly by the RV, I did not arrest him then. In fact, we try to avoid arresting people at Arctic Man, which why I said "let's try not to pick up any more cases." This statement can be heard at the end of the KTVA video.

The above twelve paragraphs complete this declaration and I declare under penalty of perjury that the foregoing is true and correct.

/s/Luis A. Nieves
Luis A. Nieves

JA 145

Exhibit A Attachment 1

SOA 0153 - SOA 0157

Alaska Department of Public Safety

Incident Report

[SEAL]

Incident: AK14025280

Incident Type:

Disorderly Conduct [90C]

Incident time:

04/13/2014 01:57 - 04/13/2014 02:42

Reported time:

04/13/2014 01:57

Incident location:

210 RICHARDSON HIGHWAY, PAXSON, Unorganized Borough AK USA 99737 (Beat/zone: HHHH)

Incident status:

Closed by arrest

Summary:

On 4/13/14 at approximately 0150 hours, Alaska State Troopers contacted a large party in the Artic Man event area to investigate minor consuming alcohol. At approximately 0157 hours Russell P. Bartlett attempted to stop Troopers

from investigating and created a hazardous condition. When being placed under arrest for disorderly conduct Russell resisted with force. Russell was charged with DC and resisting arrest.

Incident Activities/Offenses

- Disorderly Conduct - AS11.61.110(a)(6) - Recklessly Creates Hazardous Condition For Others with No Legal Justification or Excuse
- Resisting Arrest - AS11.56.700(a)(3) - Knowingly Resists Arrest by Any Means that Creates a Substantial Risk of Physical Injury to Any Person

Involved Persons

SADLER, JERRY LEE

Classification: Interview; Owner

SID: [redacted]

Gender: Male

Height: 6'2"

Race: White

DL: [redacted]

DOB: [redacted]

Weight: 190lb

Hair Color: Brown

Build:

Eye Color: Blue

Address: [redacted]

E-mail:

BARTLETT, RUSSELL PAUL

Classification: Arrested; Charged

SID: AK6250956

Gender: Male

Height: 5'9"

Race: White

DL: 6250956 AK

DOB: [redacted]/1969

Weight: 235lb

Hair Color: Brown

Build:

Eye Color: Green

Address: 4040 OLD WOOD ROAD, ESTER, Fairbanks North Star Borough
AK USA 99709 (Beat/zone: HJBF)

E-mail:

Telephone: (Cellular phone) (907) 347-1421

Involved Addresses

- 210 RICHARDSON HIGHWAY / Incident location / PAXSON, Alaska, USA 99737 (Beat/zone: HHHH)

Related Incidents

- Same event / AK14017152 / Miscellaneous / 03/11/2014 15:57

Involved Officers

- Assisting officer / #WSK0KIRKSEY, WALLACE S / Assisting officer
- Assisting officer / #RLM2MAU, RYAN L / Assisting officer
- Assisting unit / #GLR0RICH, GABRIEL L / Assisting unit
- Assisting officer / #NCH0HAYES, NICOLAS C / Assisting officer
- Assisting officer / #PND0DUCE, P NATHAN / Assisting officer
- Assisting officer / #JLC0CARSON, JESSIE L / Assisting officer
- Assisting officer / #GDY0YOUNG, GORDON D / Assisting officer
- Reporting unit / #PALTAST PALMER BHP / Reporting unit
- Assisting officer / #JDP2PUGH, JASON D / Assisting officer
- Assisting officer / #LAN1NIEVES, LUIS A / Assisting officer

- **Reporting officer / #BLW1WEIGHT, BRYCE L / Reporting officer**
- **Call taker / #OPSFAST FAIRBANKS DISPATCH / Call taker**

Reports

Arrest report

Subject:

BARTLETT, RUSSELL PAUL / Arrested; Charged / DOB: [redacted]/1969 (44) Gender: Male (4040 OLD WOOD ROAD, ESTER, Fairbanks North Star Borough AK USA 99709 (Beat/zone: HJBF)) DL:AK:6250956

Author:

#BLW1 WEIGHT, B.

Report time:

04/13/2014 01:57

Charges:

(1) AS11.61.110(a)(6) Recklessly Creates Hazardous Condition For Others with No Legal Justification or Excuse (Not Applicable)

(2) AS11.56.700(a)(3) Knowingly Resists Arrest by Any Means that Creates a Substantial Risk of Physical Injury to Any Person (Not Applicable)

General report

Author: #BLW1 WEIGHT, B.

Report time: 04/13/2014 04:16

Narrative:

On 4/13/14 at approximately 0125 hours I contacted a large party at the Artic Man event. From the patrol vehicle I observed several people in the area who appeared to be minors. I also observed the majority of the people at the party had alcoholic drinks in their hands. I contacted the party to investigate minors consuming alcohol. As I approached, several people departed the area.

I contacted 3 male juveniles who had been consuming alcohol. I referred them to Trp. Miner for issuance of minor consuming alcohol citations. I contacted a fourth male juvenile in the area and asked him to step to the side of the party so I could talk with him. The juvenile complied, and was very cooperative. As I was investigating, **Russell P. Bartlett AK6250956** approached me in an aggressive manner. He walked straight towards me and had a look of anger on his face. Russell put his arm between me and the juvenile and informed me that I could not speak with the juvenile. He told me that I had no business talking with the juvenile and I needed to leave him alone. I attempted to explain to Russell what I was doing and why I was speaking with the 16 year old (investigating minors consuming alcohol at the party). Russell continued to get in between me and the juvenile, and continued to be hostile and aggressive. I smelled the

strong odor of alcoholic beverage coming from Russell's breath and Russell was slurring his speech.

Russell stepped forward to where his chest was almost touching mine, and his face very close to mine. I took this action by Russell to be combative in nature. I placed both hands on Russell's chest and pushed him away from me. Russell came at me again. Sgt. Nieves and I attempted to gain control of Russell. Sgt. Nieves informed Russell he was under arrest and ordered Russell to the ground. Russell did not comply. I performed a leg sweep on Russell and Russell fell forward, catching himself with his hands. Russell continued to resist and struggle as Sgt. Nieves and I attempted to gain control of his arms and place him in hand cuffs. Russell attempted to 'head-butt' Sgt. Nieves, but was unsuccessful. Sgt. Nieves verbally threatened the use of a taser, and Russell went prone and placed his arms behind his back. Russell was placed into handcuffs. Russell was transported to the Artic Man holding tent on the charges of disorderly conduct and resisting arrest.

Per the Glennallen bail schedule, bail was set at $500.

Supplementary report

Author: #LAN1 NIEVES, L.

Report time:

Remarks:

Narrative:

On 4/13/14 at approximately 0135 hours, I arrived at a large party located at the end of the "runway" during

the Arctic Man event, to assist Trooper Miner and Trooper Weight with an investigation involving minors consuming alcohol. I contacted the owner of the camp site, Jerry Lee Sadler [redacted], in front of his RV. Also present was Russell P. Bartlett **AK6250956**. Bartlett began to shout to Sadler and the occupants of the RV that they did not have to speak with me or allow me in the RV. After speaking with Sadler, advising him to secure his alcohol from random juveniles showing up on his camp site, I spoke with Bartlett, offering to explain why Troopers were present. Bartlett advised me he did not want to speak with me and then told me to leave the camp site. I departed the campsite, but remained nearby to assist Trooper Miner and Trooper Weight with crowd control.

I observed Bartlett walking towards Trooper Weight, who was speaking with a juvenile near the campsite. Bartlett began to shout at Trooper Weight that he was not allowed to speak with the juvenile. Trooper Weight explained that he was conducting an investigation involving minors consuming alcohol. Bartlett got within an arm's length of Trooper Weight, shouting that he was not allowed to speak with the juvenile. Bartlett began to close Trooper Weight, resulting in Trooper Weight pushing him away. I immediately grabbed a hold of Bartlett and advised him he was under arrest for disorderly conduct. Bartlett clenched his right fist as I grabbed his left arm, shouting no. I advised him again that he was under arrest, as he pulled away from me, as he swung his right fist towards me. Trooper Weight assisted me in getting Bartlett into a prone position, as he continued to fight with us until Trooper Miner arrived and I threatened to deploy the Taser. Bartlett was subsequently

handcuffed and transported to the Arctic Man command post by Trooper Weight on the charges of Disorderly Conduct and Resisting Arrest. Sadler approached me in front of his camp site and asked who Bartlett was. Sadler stated that he did not know Bartlett and had not invited him to his camp site.

Printed: 04/25/2014 15:44 by BLW1

Exhibit A Attachment 2

SOA 0433 - SOA 0436

Use of force IA No: UOF2014-0069 Received: Apr 15, 2014

Case No: AK14025280

Type of service being performed at time of incident: Arrest

Reason for use-of-force: Officer Safety

Officer assessment of citizen condition: Alcohol

Citizen was injured: No

Citizen was taken to hospital: No

Citizen was charged/arrested in relation to the incident: YesOfficer was injured: No

Officer was taken to hospital: No

Distance Officer was from Involved Citizen: 1 feet to 3 feet

Involved Citizen Build: Large

Involved Citizen Height: 5'7" to 5'9"

Involved citizen:

Russell Paul Bartlett

Resistance(s):

Non-Compliance

Charges against citizen in relation to the incident:

Misdemeanor

Linked address(s):
Home Address: 4040 Old Wood Road Ester AK 99709

Linked phone(s):
Home Phone: (907) 347-1421

Officers involved:

Trooper Bryce L Weight [BLW1/308024]

Officer current info:

Division: State Troopers
Bureau:
Section:

Snapshot - officer information at time of incident:

Badge/ID no: BLW1
Division: State Troopers
Bureau:
Section:
Detachment: B
Post: Palmer
Rank/title: Trooper
Age: Years of employment: Years with unit:
Off duty: Off duty employed:

Use(s) Of Force:

Unarmed: Effective

Sergeant Luis A Nieves [LAN1/305069]

Officer current info:

Division: State Troopers
Bureau:
Section: Recruitment

Snapshot - officer information at time of incident:

Badge/ID no: LAN1
Division: State Troopers
Bureau:
Section: Recruitment
Detachment: HQ
Post: Anchorage
Rank/title: Sergeant
Age: 44 Years of employment: 7 Years with unit:
Off duty: Off duty employed:

Use(s) Of Force:

Unarmed: Effective

Summary:

On 4/13/14 at approximately 0150 hours, I contacted a large party in the Arctic Man event area to investigate minors consuming alcohol. At approximately 0157 hours Russell P. Bartlett attempted to stop me from my investigation. I was contacting a 16 year old male. I asked the 16 year old to step to the side of the party so I could speak with him (music was very loud and I smelled alcohol). Once off to the side Russell Bartlett approached me in a hostile manner. I observed him walking towards me with a look of

anger on his face and a quick pace. Bartlett was placing himself and his arms between me and juvenile yelling at me that I had no business contacting the juvenile and that he would not allow it. He put his hands very close to my face, pointing. I attempted to explain to Bartlett what I was doing and why. Bartlett was obviously upset and intoxicated (strong smell of ETOH, slurring, beer in his hand). I could barely get a word out before being interrupted. It was obvious to me that no matter what I said Bartlett was not going to agree and allow me to conduct my investigation. Bartlett came closer to me. I took this act as aggression and I felt threatened. I felt as if Bartlett was about to punch me. I pushed Bartlett back to create distance between him and me. Sgt. Nieves then went hands on with Bartlett, trying to gain control. I also went hands on, and conducted a leg sweep of his right leg. Bartlett continued to not comply, and resist by force. Sgt. Nieves threatened the use of a taser and Bartlett complied at that time. Bartlett was arrested for disorderly conduct and resisting arrest.

When/where:

Date/time occurred: Apr 13 2014 01:50

Home Address: 4040 Old Wood Road Ester AK 99709

Status/assignment information:

Status: Completed

Opened: Assigned: Due: 04/15/2014 Completed: 05/26/2014

Disposition: Within Policy

Unit assigned: Un-assigned
Handled at field/unit level: No
Investigator assign: Un-assigned
Supervisor assign: Un-assigned
Source of information:

Organizational component(s):

Division: State Troopers
Detachment: B
Post: Palmer

BlueTeam chain routings

Apr 15, 2014 21:34: Sent from Trooper Bryce L Weight [BLW1/308024] to Sergeant Luis A Nieves [LAN1/305069]

Instructions:

Blue team use of force incident for your review.

Reviewed by Sergeant Luis A Nieves [LAN1/305069] on Jan 16, 2015 at 16:10

Decision: Approved

Reviewer comment:

[Forwarded by Sergeant Luis Nieves]

CC(s) of this routing were sent to the following:

Apr 16, 2014 08:57: Sent from Sergeant Luis A Nieves [LAN1/305069] to Lieutenant Lawrence R Piscoya [LRP0/264203]

Instructions:

LT here is the blue team report as requested for the Arctic Man incident.

Reviewed by Lieutenant Lawrence R Piscoya [LRP0/264203] on Jan 16, 2015 at 10:07

Decision: Not approved
Missing Information

Reviewer comment:

Sgt. Nieves: Please ensure that all audios for this contact are attached. If there are no audios, for whatever reason, then please forward this back to me.

Apr 16, 2014 10:07: Sent from Lieutenant Lawrence R Piscoya [LRP0/264203] to Sergeant Luis A Nieves [LAN1/305069]

Instructions:

Please add the audio to this incident. If there is no audio, then forward back to me.

Reviewed by Sergeant Luis A Nieves [LAN1/305069] on Jan 16, 2015 at 11:26

Decision: Approved

Reviewer comment:

No audio.

Apr 16, 2014 11:26: Sent from Sergeant Luis A Nieves [LAN1/305069] to Lieutenant Lawrence R Piscoya [LRP0/264203]

Instructions:

No audio. Our new recorders (Olympus DM-620) do not have the remote controls to activate in a dynamic situation. We must manually pull them out of our vests/shirt pockets, take them off hold (side button), press record (front button on face of recorder; poor design that if not on hold will either start or stop recording due to all control functions being on the face of the recorder [stop, record, pause]), put the recorder back on hold, then return it to our pocket. The current remotes available for this recorder retail at $300.00 (DPS supply does not provide this accessory). No audio due to technical design failure.

Reviewed by Lieutenant Lawrence R Piscoya [LRP0/264203] on Jan 16, 2015 at 08:19

Decision: Approved

Reviewer comment:

[Forwarded by Lieutenant Lawrence Piscoya]

Apr 18, 2014 08:19: Sent from Lieutenant Lawrence R Piscoya [LRP0/264203] to Captain Burke W Barrick [BWB0/250337]

Instructions:

I asked Sgt. Nieves a few questions. He indicates the person is not known by the campsite renters,

where the party was occurring. He was heavily intoxicated and Sgt. Nieves indicates he was getting closer and closer to the troopers face from his point of view. The subject was aggressive and intoxicated. By the time, Sgt. Nieves arrived, Trp. Weight pushed the subject away and they took him to the ground. Trp. Weight indicates he felt threaten with Mr. Bartlett's aggressive manner as he approached. He stated in his report that at one time, he felt that Mr. Bartlett was going to hit him and felt threatened.

Reviewed by Captain Burke W Barrick [BWB0/250337] on Jan 16, 2015 at 15:12

Decision: Approved

Reviewer comment:

Exhibit B

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. 4:15-cv-00004-SLG

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
v.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Defendants.	)
	)

AFFIDAVIT OF LIEUTENANT LAWRENCE PISCOYA

STATE OF ALASKA)
) ss.
JUDICIAL DISTRICT)

1. I work for the Alaska State Troopers and I am currently a lieutenant assigned to the D Detachment, which is headquartered in Fairbanks with additional posts in Barrow, Cantwell, Delta Junction, Galena, Healy, Nenana, Northway, and Tok. I make this affidavit at the request of the Alaska Attorney General's Office, which represents Sgt. Luis Nieves and Trooper Bryce Weight.

2. I have had had overall incident command responsibility for Alaska State Troopers work at the annual Arctic Man ski event since 2009. The Alaska State Troopers' mission for Arctic Man 2014, consistent with past years, was to provide public safety and law enforcement. The event encompasses an area of approximately three miles off the Richardson Highway at mile marker 197.5, which is north of Paxson.

3. Troopers from all over the state work at the Arctic Man event and stay in nearby lodging at the Black Rapids Cold Weather Testing Site at mile post 226.7 of the Richardson Highway. This housing facility is used with permission from the U.S. Army. AST uses a mobile command center (a mobile RV) owned by the Department of Military and Veteran's Affairs. AST sets up an on-site holding tent to process arrestees. Troopers working at Arctic Man communicate through a localized radio channel (Simplex) monitored by an on-site dispatcher rather than through the state-wide radio system. The state-wide radio system can only be accessed at the mobile command center.

4. Public safety and law enforcement at Arctic Man is unique for several other reasons as well. One major concern is the widespread extreme alcohol use at the event. This leads to high levels of intoxication and increased officer safety concerns. Because of this, I fully brief troopers in person before the event. We encourage troopers to pair up at all times if they can. We mandate that all troopers will be paired up upon entry into the beer tent. Arctic Man is held in a remote location with limited medical resources and limited backup. And because transport of prisoners is more difficult due to the remoteness of the location and it decreases

available staff, we don't encourage arrests. However, Troopers are told to use their judgment during each case and if they believe an arrest is necessary then they should complete it. If someone is unruly or highly intoxicated, troopers should be firm, professional, and fair. Troopers are encouraged to be proactive and to stop and address safety problems observed, e.g., speeding, reckless driving, people riding on the back of ATVs, and any other unsafe behavior.

4. Pre-set bail conditions for routine charges such as disorderly conduct are set by the court and disseminated to troopers in advance of Arctic Man. If a person makes bail, he or she is released on-site. Troopers are required to complete their reports before they leave the Arctic Man site.

5. We design the shifts to overlap during the busy times of each day of the Arctic Man event. Those busy times are between 1600 - 2000 hours and 2200 - 0200 hours. The first shift typically covers all potential search and rescues, injured riders, crashes, and afternoon events held by Arctic Man. Troopers get extremely busy at the end of the day shift. The later shift occurs after people have returned to their campsites and are ramping up the alcohol use. These campers have had four to five hours to eat, get cleaned up, and drink. During this time span, troopers are busiest dealing with intoxicated people. Arctic Man attracts the extreme side of alcohol consumption. In fact, there are so many intoxicated people at the event, the event organizer hires a bus called "the drunk bus" to transport people around the campgrounds. Active trooper patrols have likely saved many lives at the event. One year, for example, troopers found an

underage drinker passed out in a snow berm. Troopers know all too well the heightened risks to intoxicated campers – particularly vulnerable campers – of hypothermia and sexual assault.

6. To not only increase trooper presence, but give the appearance of high trooper presence, I instruct troopers to conduct many patrols and to be highly visible. As a result of this tactic, people have routinely told me they believe twenty troopers were present, when, in reality, AST has only six to eight troopers during peak overlapping shifts, at the event with upwards to 8,000 - 10,000 people. This high visibility deters a lot of problems. I also give high priority to providing back up. Although the vast majority of the campers that attend Arctic Man are good people, at times, some are so intoxicated they literally do not know what they are doing. Safety for the public is a trooper priority, but individual trooper safety is equally important.

7. It is not unusual for AST to get a media request to accompany a trooper on patrol at Arctic Man. Over the years National Geographic has done that. In 2014, KTVA contacted as the AST Public Information Office to request a ride-along. I assigned the KTVA reporter to accompany Sgt. Lu Nieves. Sgt. Nieves is an experienced and reasonable trooper who is knows policy and procedure and is familiar with the risks at Arctic Man. I typically limit media ride-alongs to no more than four hours a shift to lessen the burden on the trooper of the extra responsibility for a passenger.

8. I reviewed the use of force report that was submitted by Trooper Bryce Weight in connection with the arrest of Russell Bartlett. When I requested audio

from the troopers involved, I was referring to official trooper audio, if it existed. Sgt. Nieves informed me that neither he nor Trooper Weight had time to activate their audio because it was a dynamic situation and because of the design of the Olympus DM-620 recorders. This response was reviewed and approved and no policy violation was found.

9. I have since been provided more information about Bartlett's conduct, including depositions and the KTVA video and the enhanced video. In my opinion, Bartlett's arrest was reasonable under the totality of the circumstances, including Bartlett's interference with Trooper Weight's investigation, his apparent intoxication, and the increased risks to troopers at Arctic Man based on the factors discussed above.

10. I continue to have significant concerns about the Arctic Man event both in terms of public safety and trooper safety. When people ask me about the event, I routinely discourage them from attending because if they don't attend, that is one less at-risk person that troopers need to be concerned about.

/s/Lawrence Piscoya
Lawrence Piscoya

SUBSCRIBED AND SWORN TO before me this 1 day of December, 2015.

[SEAL] /s/Ashley Sargent
Notary Public in and for Alaska
My Commission Expires: w/office

Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
AT FAIRBANKS

Case No. 4:15-cv-4 SLG

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
vs.	)
	)
LUIS A. NIEVES, in his personal capacity and BRICE L. WEIGHT, in his personal capacity,	)
	)
Defendants.	)

DEPOSITION OF BRYCE L. WEIGHT
July 31, 2015

APPEARANCES:

FOR PLAINTIFF:

MR. ZANE D. WILSON
Cook Schuhmann & Groseclose, Inc.
Attorneys at Law
714 Fourth Avenue
Suite 200
Fairbanks, Alaska 99701
(907) 452-1855

FOR DEFENDANT:

MS. STEPHANIE GALBRAITH MOORE
Senior Assistant
Attorney General
Department of Law
Attorney General's Office
1031 West Fourth Avenue
Suite 200
Anchorage, Alaska 99501
(907) 269-5190

ALSO PRESENT:

MR. ALEX KRAMARCZUK

* * * *

METRO COURT REPORTING
405 West 36th Avenue, Suite 201
Anchorage, Alaska 99503
(907) 276-3876

* * *

[p.29]

Q Why don't you draw an arrow to reflect your direction of travel?

A Okay. And again, this is just my memory. We were moving away from the -- the people and the -- the noise.

Q And how far away from the people and the noise did you get?

A I couldn't give you an exact answer.

Q So, why don't you go ahead and put another circle at the point you believe you stopped with Mr. Walker to chat with him.

A Okay.

Q Okay. Why don't you put a -- let's put a 1 in the first circle and 2 in t he second one. So, the 1 would be where you first saw him, right?

A Sure.

Q And 2 is where you stopped to chat with Mr. Walker, correct?

A Correct. We moved away from the people and the music.

Q Okay. So, at the point you stopped with Mr. Walker you started engaging him in conversation, is that correct?

A Correct.

Q What was your perception at that time in terms of the distance you needed to stand from Mr. Walker for you and him to converse?

A I don't recall the exact distance we were.

* * *

[p.33]

Q (By Mr. Wilson) And that's one of the reasons why you try to put as much specifics as you can in your police report, right?

A That's why I write the police reports.

Q Yeah. 'Cause you don't want to be two months down the road trying to remember what you said and you don't have it in your report?

A Those things help me remember, correct.

Q Okay. So, you're having this conversation with Mr. Walker what happens? Whe – when is the first time you notice Mr. Bartlett?

A The very first time I ever noticed Mr. Bartlett was when I was talking with the – the teenager this individual who was Mr. Bartlett starts approaching me. I see him coming from a – a little bit off, he has this look on his face like he is pissed and he is walking straight at me.

Q And how far is Mr. Bartlett away from you, as best as you can recall, when you first observe him?

A Again, can't give you the exact distance. Are you asking for an estimation?

Q Yep, give me your best estimate.

A Okay. Just something like 20, 25 feet.

Q And is Mr. Bartlett with anybody as he's approaching you?

A I don't recall if he was with anybody.

[p.34]

Q And what is it about Mr. Bartlett that you say indicates to you that he was pissed?

A He had a look on his face like he was on a mission. He was zeroed in on me, a look of anger on his face

and there was no question where he was going, he was coming right for me.

Q And so then Mr. Bartlett arrives at your location, correct?

A He comes and stands next to me and the teenager.

Q Okay. And how long is it between the time that Mr. Bartlett arrives standing there at -- with you and the teenager and the time that you shove Mr. Bartlett?

A Again, I can't give you the exact perfect amount. From my memory it was less than a -- probably a minute.

Q And Mr. Weight, just to save you this I -- I'll -- you don't -- I understand you're giving me your estimate, your best recollection. Okay. I -- so, I'll stipulate that that's what you're doing, okay?

A Sure.

Q If you're doing something other than that you let me know because otherwise that's what I assume you're up to. All right?

A If I can give you an exact answer I'll let you know.

Q Okay.

MS. GALBRAITH MOORE: Otherwise -- well -- but

[p.35]

answer the questions that -- that you -- in a way that you feel is appropriate.

A Yep.

Q Sure. So, less than one minute. Can you give me a -- it was at least a certain amount of time?

A It would -- definitely it was not immediate. I'd say at least 30 to 45 seconds.

Q Okay. And then what is the first part of the conversation that Mr. Bartlett participates in from your standpoint?

A When Mr. Bartlett approached he was visibly angry, you could tell the way he was talking to me he was angry. The harshness in his voice and again, I can't tell you the exact words that he was saying but it was you have no right to be here, get out of here, you can not talk to this -- this kid. I tried to explain to him who I was, what I was doing, and it was almost impossible for me to get a word out. He was talking over me, interrupting me, not letting me say anything verbally really. He was very adamant and it was obvious to me it didn't matter what I had to say. I could -- there's not anything I could possibly say or have said in that situation to get him to leave or exit the situation. There was nothing verbally I could have done, it was obvious to me.

Q Okay. So, and I understand you -- you're not giving us

[p.36]

quotes but you conveyed the concept that Mr. Bartlett says you have no right to be here, he wants you to get out of here, you can not talk to this kid.

You then tried to explain your position on those issues with Mr. Bartlett and then what's the next -- what else happens in this conversation?

A He gets more ramped up as it goes on because I am not doing as he's basically commanding me to do. I'm not doing what he's telling me to do and he escalates his voice, his hand gestures, his overall demeanor becomes more hostile because I'm not complying.

Q So, from the time he arrives until the time you shove him is it a continuing escalating behavior on behalf of Mr. Bartlett, that what you're describing to me?

A Yes.

Q Okay. And so then I want to make sure I have any other conversations you had with Mr. Bartlett before you shoved Mr. Bartlett that you can recall?

A I tried to talk to him, I tried to explain what I was doing, it was not working. I was beginning to feel threatened and felt threatened for my own safety and the safety of other people in the area.

Q And what was it that Mr. Bartlett did that made you feel threatened?

A Well, he decreased the distance between myself and him,

[p.37]

he absolutely put himself between me and the teenager that I had been talking to. The look on .....

Q Well, let .....

A ..... look on his .....

Q ..... let me -- let me interrupt you there. I don't mean to (indiscernible - fast speaking). What about him putting himself between you and the teenager made you feel threatened? Why does that make you feel threatened?

A Because -- and I want to get this right but -- by him putting himself between me and that person that could be considered he doesn't want to miss and accidently hit that person or if he's going to become assaultive he wants to kind of move that person out of the way, I guess you could say type of a deal.

Q Was that person ever in the way?

A Me and the teenager were talking and then he got in between us.

Q But was the teenager ever between you and Mr. Bartlett?

A Well, I think -- well, Mr. Bartlett wasn't there when I was talking to the teenager initially. So, I would say as soon as Mr. Bartlett approached he interjected himself between us.

Q Okay. Fair enough.

A Yeah.

Q My question is, was there ever any point in time where

* * *

[p.40]

either, let's put T for teenager.

A Okay. So, ...

Q And where is Mr. Bartlett when he first arrives?

A I remember him coming from the -- my left side. So, Bartlett would have interjected something like that.

Q So, put the B where you recall him standing. Now, you got movement there, I want to make sure I know where he came to rest as he first started to speak with you.

A Okay. So, he would have been something like this and then I would have turned towards him.

Q Okay. And so then, I mean, even as you have it right there it seems to me like the teenager is not in any way an impediment to Mr. Bartlett assaulting you, correct?

A The teenager moved. It's not a -- a static .....

Q Right.

A ..... situation.

Q But I'm just asking right here. Okay. Wh -- is that -- is that a correct statement?

MS. GALBRAITH MOORE: Objection, form of the question.

Q (By Mr. Wilson) Upon initial contact with Mr. Bartlett, his initial sh -- coming to speak with you the teenager was not in any way an impediment to Mr. Bart -- Bartlett assaulting you, correct?

A Mr. Bartlett interjected himself in between me -- myself

[p.41]

and the teenager. The teenager moved off to the side and Mr. Bartlett began yelling at me basically.

Q I .....

A I can't draw a video, I can't draw a moving thing, I can draw a static.

Q Sure. I get that .....

A Yeah.

Q ..... but I'm asking you a very specific question.

A Can you rephrase it then?

Q Sure. As you just described it and I know we're frozen in time here, okay. This is the point Mr. Bartlett arrives. Mr. Bartlett starts to speak with you and as I understand it that's what you've depicted as far as locations here, is that correct?

A Mr. Bartlett comes and intervenes, ...

Q Yes.

Q ..... gets in my face, yes.

A Okay. And what I'm saying is as of this moment the teenager is no way an impediment to Mr. Bartlett assaulting you, correct? He's not in between you, he wouldn't -- Mr. Bartlett wouldn't have to worry about hitting him if he took a punch at you, ...

MS. GALBRAITH MOORE: Objection, form, ...

Q ..... or any of those kind of factors?

MS. GALBRAITH MOORE: ..... foundation.

* * *

[p.43]

Again, you asked me to draw this from my recollection. You know, this is what I recall. I'm talking to the -- the teenager, Mr. Bartlett comes on a string like a man on a mission straight at me and interjects himself in between me and the teenager.

Q Okay. Now, explain to me how it is as -- based on this depiction as you've said. This is the moment in time where you -- Mr. Bartlett just arrived, how it would be that the teenager would be some sort of a -- at threat, you know, being in the middle of it if Mr. Bartlett had took a punch at you?

A If Bartlett reached back he could possibly hit him with his elbow.

Q So, if he did something backwards he might do it but if he lunges at you the teenager would have been behind Mr. Bartlett, right?

A Well, the dynamics of a punch people don't just go straight oftentimes they do move their arms back prior to throwing those punches.

Q Okay. And as you recall it is there ever a point in time where these loc -- relative locations here change in the course of this conversation before you shoved Mr. Bartlett?

A Again, I -- I don't recall the exact, every single movement that was made once Mr. Bartlett was on scene.

* * *

[p.52]

Q ..... that's why it's not in your report?

A ..... I would disagree with that.

Q But it certainly didn't come to mind to you whenever I asked you to tell me everything you said to Mr. Bartlett and you didn't even -- even as you sit here today didn't think to say that to me, did you, until I specifically raised it with you?

A And again, I'll do my best to answer every question you have. I will tell you what I recall from the conversation. Your question might jog a memory, if you would.

Q Let me ask you about the first sentence here of the next paragraph. Could you read that to me would you?

A Are you talking about paragraph three at the bottom?

Q Yes, sir.

A Russell stepped forward to where his chest was almost touching mine, and his face -- his face was very close to mine. I took this action by Russell to be combative in nature. I'm sorry, that was two sentences.

Q And then go on one more actually, you're doing well, one more sentence.

A I placed both hands on Russell's chest and pushed him away from me.

Q The way I read this paragraph is that this is the final precipitating action by Mr. Bartlett that led you to

* * *

[p.54]

that happened before, okay, but we're down to the last thing that makes you do what you do is that Mr. Bartlett gets to where his chest is almost touching yours, his face is very close to you, you took that to be combative in nature and therefore you pushed him away?

MS. GALBRAITH MOORE: Your question?

Q Am I reading that -- am I understanding .....

MS. GALBRAITH MOORE: Objection, ...

Q ..... that correctly?

MS. GALBRAITH MOORE: ..... asked and answered.

A Yeah. You're -- you're reading it correctly but he also had his hands in my face.

Q (By Mr. Wilson) You say -- okay. So, you're missing that part. All right. But you certainly -- is it your recollection that the hands, him almost touching you, his face was very close to you, you took those as

combative and that was the final straw, you decided to shove him?

A It was everything up to that point. He was very angry and he was very hostile, I thought I was about to get assaulted.

Q And then you say I sh – pushed him away from me. Then you say, quotes: Russell came at me again.

A That was my recollection at the time I wrote the report.

Q And do you believe that's an accurate recollection?

A Having viewed the video I don't think it's 100 percent

* * *

[p.68]

of the Sadler party other than what we've already discussed in this case?

A Any other contact beside – I can tell .....

Q Relative to this matter in any way, okay?

A Okay. Well, what I think you're getting at which of course I'll answer because I think that's what you're talking out but did I go back and talk to the teenager afterwards?

Q Yes, sir.

A Okay. And the answer to that is yes, I did. I was concerned that the kid had been drinking and this – who – individual who I'd never seen before, never contacted before that I didn't approach or initiate

anything with was trying to run interference for this -- for this kid. So, I did go back and talk to the kid.

Q And what did you -- what -- tell us what happened?

A And again, and I can't tell you the exact words that were used but the kid kind of seemed surprised about what just happened. I asked him if he knew that individual that just got arrested and he told me no. And he seemed like he had no clue. I was like, you've never seen that guy and again, I can't tell you exactly what I said but it was do you know him at all, those are the -- the basics. And he's like no. And the guy that was with him also was like no, we don't know who that guy is. The guys -- the

[p.69]

kid and the other guy that was with him at that point, very cooperative, very compliant. The teenager blew into a -- a PBT, a preliminary breath test, it was triple zeros. I thanked him for his cooperation, he wasn't in any kind of trouble at all and he went on his way.

Q Didn't the -- did the thought occur to you at some point that you should take down the name of the person who stood right there and witnessed all these events?

A I was trying to get back so I could deal Bartlett at that point.

Q But that -- that's not my question. Did the thought occur to you at that point in time .....

A At that point in time, no.

Q Does the thought occur to you at this point in time that that would have been an appropriate thing for you to do?

A Yes.

Q And this other person who is there can you – do you remember anything about this other person?

A Again, a male. It was a White guy, nice, cooperative.

Q About how old?

A Probably a little younger than I am, I'm 32.

Q Any facial hair?

A I – I don't recall.

Q Do you remember anything about hair coloration, eye color or anything else you can tell me about this other person?

* * *

[p.87]

Q (By Mr. Wilson) Sure.

A ..... asking there?

Q So, you didn't ask Mr. Bartlett?

A No , I did not – I did not believe he would provide any kind of a breath sample given his demeanor and uncooperativeness.

Q And had you simply asked him then we would know what Mr. Bartlett would have ever said in response to that question, correct?

A I can imagine what he would have said but yes, we would have known.

Q We would have known. And instead what we're left with is your inferences about what you believe Mr. Bartlett would have said had you asked him the question you never asked him, correct?

A As far as the question goes, yes. Based on my training and experience and everything he was exhibiting, the totality of his circumstances and everything I think as long as you like to use that word reasonable, a reasonable officer could infer he was impaired.

Q And one of this thing in this use of force report that gets kind of raised as an issue is where is the audios, right?

A I haven't seen this.

Q Go on to 0435, right at the very bottom.

* * *

Exhibit D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
AT FAIRBANKS

Case No. 4:15-cv-4 SLG

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
vs.	)
	)
LUIS A. NIEVES, in his personal capacity and BRICE L. WEIGHT, in his personal capacity,	)
	)
Defendants.	)

DEPOSITION OF LUIS A. NIEVES
July 31, 2015

APPEARANCES:

FOR PLAINTIFF:

MR. ZANE D. WILSON
Cook Schuhmann & Groseclose, Inc.
Attorneys at Law
714 Fourth Avenue
Suite 200
Fairbanks, Alaska 99701
(907) 452-1855

FOR DEFENDANTS:

MS. STEPHANIE GALBRAITH MOORE
Senior Assistant
Attorney General
Department of Law
Attorney General's Office
1031 West Fourth Avenue
Suite 200
Anchorage, Alaska 99501
(907) 269-5190

ALSO PRESENT:

MR. ALEX KRAMARCZUK

* * * *

METRO COURT REPORTING
405 West 36th Avenue, Suite 201
Anchorage, Alaska 99503
(907) 276-3876

* * *

[p.31]

receiver and then a -- a microphone similar to what I'm wearing right now and it's a wireless.

Q So, before you got out of the car is it fair to say that you knew you were going there to investigate minor consuming?

A Yes.

Q If you know you're going to a scene to investigate why don't you activate your audio recorder at that point?

A At that point I had multiple officers, music, it was a -- a -- I had just spoken to one of the Troopers there and -- which was Trooper Weight who advised me of the situation. I didn't activate my recorder. I have a -- don't have a reason why I didn't activate my recorder I just went in to go and speak with the -- my goal was to speak with who -- who was ever in charge of the camp site and tell them that people were -- that kids were talking their alcohol and they needed to store their alcohol.

Q Sure. You would -- would you agree with me that you could have easily activated your recorder before you got out of your police vehicle?

A It -- it depends. The -- the -- this type of a recording system that I have if -- if I allow myself enough time for officer safety I can activate this -- this recorder but in this situation where it was -- it was still developing I -- I just didn't think of activating it at

* * *

[p.62]

A To the RV?

Q Yeah.

A When I'm inside the RV?

Q Well, did you get inside the RV?

A Yeah.

Q And what point is Mr. -- what is the situation, where exactly are you .....

A Oh, well, ...

Q ..... when you –

A Well, depending on what you're going – I'd like to see the footage that you have because the footage that I've reviewed it's completely chopped. I'm – it's completely edited. I'm at the doorway, you hearing me speaking momentarily and that's just a small fraction of the conversation that happened. So, it's not even the entire conversation where your client's yelling and screaming that they don't need to al – speak with me, that Mr. Sadler doesn't need to allow me to enter the RV at which point Mr. Ad – Sadler allows me to enter the RV. I closed the door behind me 'cause I couldn't hear – I couldn't focus on what Mr. Sadler was saying to me and what your client was doing disrupting the – the entire invest – situation there.

Q It – Trooper Nieves, I think we've seen – all seen the same video. Okay. There is just a short clip there but

* * *

[p.65]

Q Okay. And then do – did you have to do something to get Mr. Bartlett's attention or you just walked up to him and started speaking?

A I believe I tapped him on his shoulder, he turned around.

Q Okay.

A And .....

Q And what did you say?

A I said, hey, Mr. Bartlett I just – well, I didn't know what his name was then – I said hey, sir, I – I just wanted to explain to you why we're here right now. As you saw we're trying to secure the alcohol and he starts yelling at me saying that I don't want to talk to you, I don't have anything to say with – say to you, you need to get out of here if you're done. So, at that point I had to make a decision. You know, it's this guy is highly intoxicated, he's not being reasonable, do I stay here and then run the risk of now he ends up crossing that line and becoming disorderly or can I just leave and defuse the whole situation. I chose to leave.

Q And what was it that you believed that indicated to you that Mr. Bartlett was highly intoxicated?

A Slurred speech and white watery bloodshot eyes, thicks – the – his level of aggression which made zero sense to me, and his failure to understand the circumstances, the fact that there's juveniles consuming alcohol and the

* * *

[p.70]

A There was a female that answered the door and then she – I asked who was in charge and then she had a – a – Mr. Sadler come up and then that's when I started speaking with Mr. Sadler and I couldn't hear much of what he was saying because your client was yelling. And then I explained to him why I was there and then once he understood why I was there he told me to come in, close the door. We spoke about the fact that we had juveniles taking the alcohol and he agreed to immediately bring the

alcohol in and then he even agreed to shut down the party. He asked me -- he asked me do you want me to shut down the party and I said no, not at this time we just need to secure the alcohol right now.

Q I read down through your report and now moving on to the second paragraph and I want to draw your attention to this thing which is -- it says: Partlor -- Bartlett begin to close Trooper Weight resulting in Trooper Weight pushing him away. Do you read that?

A Yes.

Q The way I read that is that you're stating here that the reason that Trooper Weight pushed Mr. Bartlett is that immediately proceeding Trooper Weight pushing Mr. Bartlett, Mr. Bartlett was closing on Trooper Weight?

A Yes.

Q And you believe that an accurate statement as to what

* * *

[p.72]

Mr. Bartlett is closing on the Trooper as opposed to the opposite?

A No. No. No. He -- he had closed the distance from -- he -- Mr. Bartlett was all the way on the other end of the campsite when I first contacted him. I walk around the corner, I thought Mr. Bartlett at that point remained to enjoy the music. Your client then came all the way across as I'm watching to see what

my -- my Trooper is doing. Your -- your client came all the way across and brought the fight to my Trooper and started getting involved in an investigation where we believe a minor may have been consuming alcohol. Your client then starts getting closer, closer, closer, tensing up and then gets in my Trooper's face at which point my Trooper has to clear Mr. Bartlett away from him.

Q Okay.

A And those are my observations.

Q Sure. And what I asked you before when we read this language here was that it was Mr. Bartlett, not the fact that Mr. Bartlett walked across from the party, okay, what precipitated Trooper Weight shoving him, it was that according to you Bartlett begin to close Trooper Weight resulting in Trooper Weight pushing him. And I asked you are you saying that right before Trooper Weight shoved him Mr. Bartlett took some steps to close toward -- on

* * *

[p.77]

Q Okay. So, ...

A Okay.

Q ..... before .....

A This part to that and you'll see -- well, that's why I positioned myself around his back 'cause I don't want to get hit in the face.

Q By what?

A By his fist.

Q So, we've already seen the part where he swung his right fist at you?

A Yes, sir. He -- from what I can see he's getting ready to swing and then that's why I stepped around the back of him and that's why I'm -- I get behind him.

Q Okay. And then is this where he's fighting with you?

A Yes, sir. He's tensing up the whole time, that's stuff that you may or may not be able to see on video but he's tensing up, he's pulling away from us and we're holding on for everything we've got on him.

Q Do you give people a second to kind of digest what's occurring whenever you grab a hold of somebody like that?

MS. GALBRAITH MOORE: Objection, foundation.

A He knew he was being contacted by Troopers. At that point there's no -- he was being placed under arrest. He -- he was already creating a hazardous situation, he's going to jail.

[p.78]

Q (By Mr. Wilson) So, at -- I mean, at the very moment that you guy -- that Trooper Weight decides to push Mr. Bartlett, Mr. Bartlett is standing there, correct?

A No, he's trying to clear Mr. Bartlett from attacking him which is what my perception was as well. I we both felt that -- I felt that Trooper Weight was in

danger and Trooper Weight clearing him that's clear to me that Trooper Weight also felt that he was in danger at that point. Your client was being unreasonable and was creating a hazardous situation and it was only a matter of time before he struck my Trooper so we stopped it.

Q You're not a mind reader, are you?

MS. GALBRAITH MOORE: Objection, form of the question .....

A Unh-unh (negative).

MS. GALBRAITH MOORE: ..... and foundation.

Q (By Mr. Wilson) I just wanted to make sure that we're all on the same page.

A Well, that's kind of an insulting question but .....

Q Are -- do you claim to have some ability to read people's minds?

MS. GALBRAITH MOORE: Same objection.

A It's a -- that's an offensive .....

MS. GALBRAITH MOORE: It's an .....

A ..... question.

* * *

[p.82]

Q But -- and .....

A I answered your question, it's scenario based. It -- I can't .....

Q No, my .....

A ..... I can't give you a blanket answer on that.

Q This is the scenario. Okay.

A What's a .....

Q I'm asking you about this scenario. I understand that, ...

A Yes.

Q ..... you understand that.

A My Trooper was not safe with your client one on one in that scenario.

Q Okay.

A And that is why I responded.

Q I understand that's your opinion.

A No, that's a fact .....

Q My .....

A ..... and your client's actions .....

Q ..... but my -- I'm actually asking .....

A ..... confirmed it.

MS. GALBRAITH MOORE: Wait. Wait .....

Q ..... a little different question.

MS. GALBRAITH MOORE: ..... for a question.

Q ..... than that.

* * *

[p.88]

A No, even -- well, yeah, when the video starts you can see where he's getting louder and getting closer to my Trooper and that's my perception and that's why I had to act.

Q Mr. Bartlett isn't even talking at all .....

MS. GALBRAITH MOORE: Objection, form.

Q ..... when the video picks up, correct?

MS. GALBRAITH MOORE: Objection, form of the question, foundation.

A It sounds to me like he's yelling from what I saw.

Q (By Mr. Wilson) Was there ever any point where Mr. Beard contacted you and asked about whether or not there was a video in this case or was your first contact Mr. Beard contacted you and he already knew there was a video?

MS. GALBRAITH MOORE: Objection, foundation.

A I don't remember. I just remember him saying can you get -- can you -- can you subpoena the cameraman and tell him to bring any footage that he has with him. And then where I learned about sub -- doing the subpoena for the executive producer as well was through our public information office because I had to figure out who the cameraman was and how to get a hold of him and they recommended that I subpoena both.

Q (By Mr. Wilson) And are you aware of any video, other than the video we've just played here?

* * *

[p.93]

crime?

MS. GALBRAITH MOORE: Objection, foundation.

A No, sir. That -- that -- that was that -- he -- I -- I believe your client clearly understood what I was referring to, the fact that when my -- when my -- when my Trooper initially told him hey, I'm in an investigation, you need to walk away and your client chose not to and -- and instead bring the fight to him he should have walked away and then he wouldn't be in jail and we wouldn't be here right now.

Q (By Mr. Wilson) Okay. Do you claim that you heard -- well, let me back up and just ask the question this way. I want you to tell me every word that you heard, you claimed to have heard between Mr. Bartlett and Trooper Weight in reference to the -- from the point they came together until the point that Mr. Bartlett leaves the scene in handcuffs.

A My recollection is -- Trooper Weight is -- he -- Bartlett is yelling at him you can't talk to him, you can't talk to Mr. McCoy -- you can't talk to him. And Trooper Weight says sir, I'm a -- I'm speaking to him, you've got to go away, you got to walk away. Walk away. He says you can't talk to him, you can't talk to him and he starts getting closer, getting more aggressive. And then at one point it looks like he's getting ready to hit my

[p.94]

Trooper and my Trooper clears him.

Q Did you hear any other conversation between Trooper Weight and Mr. Bartlett?

A No, other than Trooper Weight telling him to disburse, to leave and your your client's refusing to do so.

Q Tell me as is bat -- as best as you can recall exactly how it is that Trooper Weight told Mr. Bartlett to disburse and leave.

A You need to leave. You need to leave.

Q Anything else other than what we've already talked about?

A No, I -- I -- it was clear to -- we made many attempts to explain to Mr. Bartlett why we were there, that there was juveniles consuming alcohol and that's a significant issue as you can imagine in Alaska and especially at Arctic Man and that's why we were there and he chose to not accept that reasoning.

Q Would you agree with me that Trooper T – Mr. Bartlett is certainly entitled to just stand there and listen to you guys say these things to him, right?

MS. GALBRAITH MOORE: Objection, foundation.

Q (By Mr. Wilson) Is he entitled to do that?

MS. GALBRAITH MOORE: Stand where?

A Stand where?

Q Stand where he was, stand right there .....

A No.

* * *

Exhibit E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. 4:15-cv-00004-SLG

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
v.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Defendants.	)
	)

DEPOSITION OF DAVID KRACK
July 27, 2015

APPEARANCES:

FOR THE PLAINTIFF:

ZANE WILSON
CSG, INC.
714 Fourth Avenue, Ste, 200
Fairbanks, Alaska 99701
(907) 452-1855

FOR THE DEFENDANTS:

STEPHANIE GALBRAITH MOORE
Department of Law

1031 West Fourth Avenue,
Suite 200
Anchorage, ALASKA 99501
(907) 269-5190

* * * *

* * *

[p.21]

A I don't remember where he was at that time.

Q So you don't know if he was with you at the time?

A He was at the party, but I don't think he was right next to us.

Q You don't think he was next to you when you saw sergeant -- or the person go to the RV?

A Unh-huh.

Q Right? And why do you think that? Why do you say that?

A What.....

Q Just your memory that he wasn't there?

A That's -- yeah. I don't remember him being right next to us at that time.

Q So did you watch the trooper at the RV? What did you see?

A After that, I -- Russell went over there and asked the trooper, you know, what was going on. They talked. I was too far away. And the trooper left and Russell came back.

Q The -- so the -- Russell went over on his own to.....

A Uh-huh.

Q .....the trooper? You're nodding your head. You need to.....

A Yes.

Q Yes.

[p.22]

A Yes.

Q How close did he get to the trooper?

A Five feet.

Q How close were they -- was he to the door of the RV?

A 10 feet, maybe. They were right in front of it.

Q And did the trooper tor -- did he it look the trooper and Mr. Bartlett were talking to each other?

A Yes.

Q And do you have any idea what they were -- could you hear anything?

A No.

Q You couldn't hear.....

A I was too far away.

Q .....anything?

A No.

Q Did Mr. Bartlett tell you, at any point in time, what he said to the trooper?

A No.

Q Did he tell you later, at some other day, what he told you -- what he said to the trooper?

A I really don't remember what he said, if he said anything at all.

Q Do you recall -- but I talked to you on the phone a couple weeks ago, and you told me what he said. Do you remember what you told me?

* * *

[p.29]

A .....ish.

Q .....a lot of people dancing in between or just a.....

A There was a few, but the main group was not in -- in our sight line.

Q When you saw the trooper and McCoy, were there any other troopers that you could see near the two of them?

A His car was parked over to -- on his right-hand side, but I didn't notice if anybody was there or not.

Q Okay. So you headed toward them. And who -- were you walking side by side or.....

A Rusty was ahead of me by 15 feet or so.

Q By 15 feet? Did you start at the same time?

A He was ahead of me when -- when we saw them.

Q Oh, okay. So he -- did he -- where did he go? Where exactly did Rusty go?

A To the trooper.

Q To the trooper. And where exactly did you go?

A To the trooper.

Q How close did you get to the trooper?

A 10 feet.

Q And on what side of the trooper did you stop?

A His left-hand side.

Q So did you -- you passed the trooper?

A He was standing facing the party, and we walked towards him and I was on his left.

* * *

[p.33]

Q And where di -- how far away did the trooper push.....

A Well, he landed on his knees probably four or five feet in front of him.

Q What's your level of confidence that Mr. Bartlett landed on his knees after he was pushed?

A He landed on one knee. I can -- like 99 percent sure.

Q What knee? Right knee or left knee?

A Right knee.

Q And can you describe how the trooper pushed him?

A Two hands to the chest.

Q Two hands to the chest? Did Mr. Bartlett's beer spill?

A That, I don't remember. I don't know.

Q Do you know if he had a beer?

A I don't.

Q Did you have a beer in your hand?

A I don't remember if I did at that time or not.

Q Do you know what -- whether Mr. Bartlett raised his -- one or both of his hands up toward the trooper's -- in the direction of the trooper's face?

A He was speaking with his hands, you know, like.....

Q Both hands? You just demonstrated both hands.

A Yeah, but that's just how I demonstrated. I really don't know 100 percent.

Q Which hand was he speaking with?

A I don't know. Both, I think. Maybe his right.

[p.34]

Q Maybe his right? And so where -- how close did the -- his hand get to the trooper's face?

A A foot or so, maybe.

Q Maybe.....

A They were close, because you had to be close to talk to people. It was like really loud.

Q Sure. But could it have been closer than a foot, his ri -- his hand closer than a foot to the trooper's face?

A I don't think he was that close.

Q Okay. And then what happened when the trooper went to -- or what happened after Bart -- Mr. Bartlett was pushed away?

A He tried to stand up and two officers put him to the ground and handcuffed him.

Q Okay. So the -- and the trooper that was speaking with McCoy, that's the same trooper that came back and.....

A That I spoke to, yes.

Q Right, right. And that you described as calm?

A At that time, he was.

Q Yeah. And that -- I asked you this question, I think, when we spoke on the phone, so I'm going to ask you again. And I -- do you think that looking back on when Mr. Bartlett approached the trooper who was speaking with McCoy, that it's reasonable that a police officer

[p.35]

could have felt threatened by Mr. Bartlett based on his approach toward him?

A In different circumstances, yes.

Q And when I inter -- when I asked you that question on the phone interview, you said, yes and no. Do you recall saying that?

A Yeah. In different circum -- that's the no part, was different circumstances.

Q So -- but it -- but -- and if you want to go ahead and explain what you mean.

A The noise level was so high that you had to be that close to talk to people. You had to get right next to somebody to hear what they were saying or to talk to them.

Q So that would be the -- why you would say -- that's the no part of it? No.....

A Yeah.

Q .....it's not reasonable. But the yes part of it, can you explain that, why an officer could feel threatened?

A If it wasn't as loud, I would -- you know, there would be no reason for someone to be that close.

Q Before the trooper actually, you know, put his hands on Mr. Bartlett and shoved him away, did you see another trooper approaching?

A I don't recall. I didn't pay attention to it.

* * *

[p.41]

Q Okay. When is the next time you talked with Mr. Bartlett?

A I saw him the next morning, probably around 11:00 o'clock or so.

Q Around 11:00 o'clock. Where did you see him?

A At our campground.

Q Like at the campground. Where at the campground?

A I think he was outside of the RV that he was staying in.

Q Did you have a discussion with him?

A I just asked him, you know, what -- what went on? What happened? And he said they were -- because like he spent the night at their drunk tank or whatever, and they let him come and talk to Natalie to find bail money.

Q So -- and is Natalie one of the camp -- one of -- at your camp?

A Yeah.

Q And what's her last name?

A Chamberlain.

Q And he -- does she put up the bail money?

A Yes.

Q Okay. How old is Natalie?

A I really -- late -- mid 40s, maybe. Early 40s, mid 40s.

* * *

[p.59]

Q Mr. Krack, would you have been comfortable getting in a vehicle with Mr. Bartlett and having him drive you, given the amount of alcohol he'd been drinking?

A No.

Q Okay. Would you be comfortable driving a vehicle yourself.....

A No.

Q .....and have -- and why is that?

A I was over the legal limit.

Q Okay. And you think Mr. Bartlett was over the legal limit as well?

A Yes.

Q And did he have alco -- could you smell alcohol on his breath?

A Maybe. I don't know. I didn't -- I don't pay attention to that. I don't remember.

Q Do you have any law enforcement training?

A No.

Q Do you have any training on safe distances for law enforcement officers?

A No.

Q Reaction spaces.....

A Nope.

Q .....for law enforcement officers?

A None.

* * *

[p.61]

A Yes.

Q And you're testifying under oath that you could see his hands as he approached -- you could see his right hand as he approached Trooper Weight?

A Yeah.

Q At all times, could you see Mr. Bartlett's right hand as he approached Trooper Weight?

A I was on his right side, yeah.

Q You were on whose right side?

A Rusty's.

Q How many feet away were you?

A 10.....

Q Why did you tell me you couldn't.....

A .....15.

Q .....see his hand when you talked to me on the phone a couple weeks ago?

A I don't remember telling you that.

MR. WILSON: Object to the form of the question.....

Q I had a witness present.

MR. WILSON: .....argumentative.

Q I had a witness present.

A I really don't know.

MS. MOORE: I -- I'll go ahead and mark this exhibit 3, so we go in order. And have that submitted with

* * *

Exhibit F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. 4:15-cv-00004-SLG

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
v.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Defendants.	)
	)

DEPOSITION OF RUSSELL BARTLETT
July 27, 2015

APPEARANCES:

FOR THE PLAINTIFF:

ZANE WILSON
CSG, INC.
714 Fourth Avenue, Ste, 200
Fairbanks, Alaska 99701
(907) 452-1855

FOR THE DEFENDANTS:

STEPHANIE GALBRAITH MOORE
Department of Law

1031 West Fourth Avenue,
Suite 200
Anchorage, ALASKA 99501
(907) 269-5190

* * * *

* * *

[p.20]

A I want to say it's, I think, 2006ish, somewhere in there.

Q What's your height and -- current height and weight?

A I'm five foot nine inches tall, and I weigh 224 pounds this morning.

Q And what was your height and weight in April of 2014?

A Five foot nine.

Q And weight?

A And I was probably -- 2014, with a guesstimate, 245 pounds, 240 pounds.

Q 240 to 245?

A Somewhere right in there.

Q What's the weight on your driver's license say right now?

A Give me a moment, I will tell you. Excuse me, while I take this out.

Q No worries. Yeah, take it out.

A It says 235 pounds.

Q Do you know when you got that driver's license?

A I believe it was -- well, they're good for five years, I believe.

Q So when is it due?

A '17.

Q What's the maximum weight you've reached in your life?

A 270 pounds.

* * *

[p.27]

A I believe it was around 12:30 from the police report. That's the only way I recall it, what time it was.

Q And about what time were you released?

A Gosh, I -- let's see. I want to say 2:00 -- 2:30 or 3:00 in the morning.

Q How long did it take you to get from Jerry Sadler's campsite to the jail tent area?

A I want to say approximately five minutes.

Q Were you -- was David Krack near you at the time you first saw Sergeant Nieves?

A Yes, he was.

Q What do you -- how would you describe David Krack's level of intoxication at the time you first saw Sergeant Nieves?

A I have no way of determining that. He was speaking fine. He wasn't stumbling, to my knowledge.

Q Do you think his alcohol level was above or below the legal limit to drive a vehicle?

MR. WILSON: Object; calls for speculation.

Q You can go ahead and answer.

A Oh, all right. I – I – I – I believe it was.

Q It was what?

A Above the legal limit to drive.

Q And – so let's just – what – clarify what I meant by that question, what you meant by that answer. So do

* * *

[p.30]

was working the jail that night. And I believe he works over here at the courthouse.

Q Over – when you say over here.....

A At the courthouse.

Q The Fairbanks courthouse?

A Fairbanks courthouse.

Q Have you seen that person over there?

A I have not.

Q Then what makes you think he works at the Fairbanks courthouse?

A He had told me so.

Q When did he tell you that?

A During -- during my -- during my incarceration at the jail at the Arctic Man.

Q What else did you talk about with him?

A I asked him if he could release my -- or loosen my cuffs on my hands, because they were very tight.

Q And did he do that?

A He did. He brought them around from the back of -- behind my back where I was cuffed, and I brought them around to the front. And at that time, I -- I had told him and -- to take notice of how -- the color of my hands. They were purple, because the cuffs were so tight on my wrists and cutting into my wrists, that it cut off the circulation to my hands.

[p.31]

Q Had you told anyone before that, that your cuffs were tight?

A I did not. My hands started hurting -- hurting behind my back.

Q When did they first start hurting?

A I can't tell you exactly when.

Q Was that while you were in the tent?

A It was while -- while I was in the -- in the jail there at the tent. I started noticing my hands going numb and hurting.

Q And the -- and when you first told the trooper that was watching the tent, that they were -- how long did it take him to move them to the front?

A He did it immediately.

Q All right. Did you ask for any medical help at that time?

A I did not.

Q Did you ask for any medical help at any time when you were at the tent?

A I did not.

Q Did you believe you needed any medical help at the time?

A No, I did not. I didn't believe I needed any medical help.

Q So Arctic Man 2014, was that -- how long was the total

* * *

[p.68]

Q Let me ask you this. Was there a -- was there any alcohol outside the motorhome near the doorway?

A I don't recall. I don't recall.

Q Did anyone come.....

A I.....

Q .....outside of the -- out of the motorhome?

A No. I don't recall anybody coming out, no, from when I was looking over there in that direction.

Q It's possible someone came out; you just don't recall. Is that what you're saying?

A Yeah, it's possible someone came out. I – I just don't recall.

Q Did you yell anything at Sergeant Nieves while he was at the door to the motorhome?

A No.

Q Did you yell anything at Sergeant Nieves at any time before he approached you?

A No.

Q Did you yell anything at the people in the motorhome while Sergeant Nieves was approaching the motorhome or near the motorhome?

A No.

Q Did you yell anything at any time that was something like, you don't have to allow troopers to search the motorhome?

[p.69]

A No, I don't recall saying anything like that.

Q Did you say anything at any time that you don't have to let him in?

A No.

Q So you've talked already about your conversation with Trooper Nieves. Is there anything else that you

said to Trooper Nieves or he said to you near the motorhome that you -- we haven't discussed?

A I think, no. I think he -- I told you everything that he said that I recall.

Q And when he tapped you on the shoulder, where was the camera guy?

A I don't recall. I don't recall seeing him after that.

Q And where did Trooper Nieves go?

A After he tapped me on the shoulder and we exchanged -- or.....

Q Right.

A He walked off towards the back of the motorhome, in that direction.

Q All right. I pulled out a piece of paper I was going to use, and then I wrote on it.

MS. MOORE: Do you have a pen?

COURT REPORTER: I do. Do you want colors, magic markers, pencils?

MS. MOORE: A couple colors would be good.

* * *

[p.80]

trying to tell me get on the ground. But at thi -- the point I say -- I said something, I say, what's going on or something like that. I can't remember my exact words. I think it was, what's going on. They kept yelling at me to get on the ground, get on the

ground, and trying to foot sweep me again. And finally, I -- as that short period of time went by, my -- I -- I -- I -- you know, I was like, whoa, you know, I'd better comply with what these guys are saying. They -- they -- they mean business. So still not knowing what's going on, I complied and got down, started getting down to my knees while they were jumping on me and trying to force me down on the ground. The reason why I was going so slowly is because I have back injuries and -- and I didn't want to further hurt my -- my back by just flopping on the ground, so I went down very slowly.

Q So you controlled the speed at which you were taken down to the ground?

A I -- I tried to. I didn't -- not really control. It's just, I didn't flop right on the ground. I guess you can say it's controlled. I -- I went down with them pushing on me.

Q All right. So I'm going to ask you a few more questions about that. So when you first approached

* * *

[p.91]

A Excuse me.

MR. WILSON: That's 2.

COURT REPORTER: Thank you.

MR. WILSON: That's 1.

COURT REPORTER: Thank you.

Q Did Trooper Weight -- did the -- did -- when he pushed you, were you hurt?

A Explain to me where you -- what do you mean? Where was I -- was I hurt by him? Was I hurt before that?

Q Were you -- no, were you hurt by him?

A No, I mean, it didn't -- it didn't hurt me. I mean, as far as, you know, him striking me, I felt it, and there was pressure when he -- when he hit me, but I -- I wasn't injured.

Q When Sergeant Nieves took your -- well, first let me ask you this. When you approached Trooper Weight and you were standing by Trooper Weight and McCoy Walker, did you see any other trooper within 20 feet of you?

A I did not.

Q Where was the nearest trooper, do you know?

A I do not know.

Q Did you see any camera in the vicinity?

A I did not.

Q At the point Sergeant Nieves took your arm, he took your left arm, is that correct?

* * *

[p.100]

And why am I being arrested? And -- and then he goes -- and then he says, you're done. And I go, no,

I'm not done. And he shuts the door. And that was the last time I remember seeing Trooper Nieves.

Q Did you speak to Trooper Weight at any time after the arrest?

A I do not recall.

MR. WILSON: Ms. Moore, can I make one point for you? Just in terms of, if you could consider what he said there an amendment to his depo – or his interrogatory responses. There was a spot in there where, you're done and this and that, was a little confusing in his interrogatory response and.....

MS. MOORE: If you want to ask follow-up questions, you're free to do that and.....

MR. WILSON: Okay. That's fine. I'm not going to ask him a question. I'm just letting you know.....

MS. MOORE: Well.....

MR. WILSON: I'm asking you to consider that an amendment to his response.

MS. MOORE: And you can amend the responses.

MR. WILSON: I just did.

Q So have you had any medical care at all associated with your arrest?

A No.

[p.101]

Q Are you claiming that you were – had any physical injuries from the arrest?

A Physical? No.

Q Yes. Are you saying -- are you shaking your head, no?

A I said, no.

Q When is the first time you saw a videotape of the arrest?

A I want to say it's six months later, roughly.

Q So if the arrest was in April, that would be May, June, July, August, September -- like October 2014?

A Roughly.

Q And where did you -- how did you see it? How did it come about?

A My -- my friend, Alan Crow -- excuse me. My friend, Alan Crow had come acrossed [sic] it on YouTube.

Q And what did he say to you?

A He made me aware of -- this was the -- he thought this was the video of me being arrested at Arctic Man.

Q Did you -- then did you go on YouTube and watch it yourself?

A He sent me a link, yes, and then I did.

Q And that was while your criminal case was pending, correct?

A That's correct.

Q And was that the link that -- who uploaded -- who put

* * *

Exhibit G

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CIVIL ACTION NO.: 4:15-cv-00004-SLG

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
v.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Defendants	)

DECLARATION OF BRYCE L. WEIGHT

1. I have been a trained law enforcement officer for more than fourteen years. I joined the Air Force Security Forces in 2001 and completed the military security forces academy in 2002. I completed the Alaska State Trooper academy in 2007, where I was ranked number two in my class. I also graduated from college in 2007 with magna cum laude honors. I have an advanced police certificate from the Alaska Police Standards Council. I worked for the State of Alaska Airport Police and Fire Department for approximately six years, after which I joined the Alaska State Troopers. As a trooper, I have been a Field Training

Officer since 2012 and I have acted in the capacity of OIC (officer in charge) in the absence of a supervisor on duty in Palmer during the busiest shift in B Detachment, which is the busiest AST post in the state. I am also employed as a firearms instructor with the Alaska Air National Guard. My duties include teaching use of force to military personnel. My deposition has been taken in this case and this declaration has been requested by counsel to supplement that in support of a motion for summary judgment.

2. I was on patrol at Arctic Man 2014. Trooper Miner and I saw several minors at large party on the runway. Most people at the party appeared to be drinking alcohol. Several of the minors ran when they saw me but I caught a couple after chasing after them and took them to Trooper Miner for MCA processing. When Sgt. Nieves arrived on scene, I reported this to him. Trooper Miner continued to process the underage drinkers while I looked for other minors at the party who might have been drinking alcohol. I did not see Sgt. Nieves' contact with Russell Bartlett before Bartlett approached me.

3. I contacted an additional teen in the crowd and it was determined that he had been drinking. I then contacted another teen and asked him to step away from the crowd because the music was loud and I wanted to determine if the smell of alcohol was still about him when he was away from the crowd. The teen was cooperative and willing to speak with me. Before I could complete my conversation with the teen, Russell Bartlett approached me walking quickly and with an angry look on his face. Holding a beer with his left hand, Bartlett got close to me and the teen and yelled

at me that I had no business talking with the teen and he would not allow it. He put his right hand up toward my face pointing. I had no prior contact with Russell Bartlett before that.

4. Bartlett never said anything about a parent or guardian. He effectively demanded that I get out of there and that I had no business talking to this kid. I could barely get a word out before Bartlett interrupted me. Bartlett was obviously intoxicated. I tried to explain to him what I was doing and why. I found that speaking with him was futile because he continued to interrupt me and talk over me. His conduct and presence prevented me from conducting my investigation. He was within my reactionary gap, and due to his behavior, I perceived him to be a clear threat. A safe distance would be one that would give a trooper sufficient space to react to a potential threat. I tried to advise him to get back, to move back, to stop interfering, but he was talking over me. His escalating voice, his look of anger, his body language all appeared hostile and I interpreted them as pre-assault indicators. An open-palm push is taught in training as a tactic that can be used to safely move someone back. Although I am taller than Bartlett, he appeared to outweigh me. Bartlett appeared to be intoxicated; people under the influence of alcohol and drugs are unpredictable and often uncooperative.

5. When I realized that Sgt. Nieves had arrived and had taken hold of Bartett's left arm, I moved forward to assist. Sgt. Nieves issued clear commands to Bartlett to go to the ground, which he did not comply with. I took Bartlett's right arm and Bartlett turned toward Nieves and then me, tensing his arms. I attempted a

leg sweep and attempted to use an arm bar control. Bartlett went first to his knees and then to all fours, but continued to tense his upper back and neck against our efforts to gain compliance. At one point when I put my hand on the back of his neck, he was strongly resisting my downward pressure, and Sgt. Nieves' head was directly above Bartlett's head. The attached series of thirteen screen shots taken from the KTVA video are true and accurate images of me and Sgt. Nieves. The screen shots show that our heads were above Bartlett once he was on both knees and that at times Sgt. Nieves' head was close to Bartlett's head and also directly above his head, all the while Bartlett was using upward force against significant downward pressure from my right hand and my body weight. It is my understanding that these screen shots were prepared directly from the KTVA video and that they are continuous and in chronological order 1 – 13 with no intervening screen shots omitted.

6. Sgt. Nieves was not with me when I first approached the teen or when Bartlett first approached me. I do not recall being consciously aware that the news was filming any part of Bartlett's arrest as it was occurring. Because I perceived Bartlett to be an immediate threat, my focus was on him.

7. All reports generated at Arctic Man had to be completed before we were done with our shift. A true and accurate copy of my AST report dated April 13, 2014, is attached hereto as Attachment 1. Because some force was used to arrest Bartlett, I submitted an internal use of force report. A true and accurate copy of my April 15, 2014, use of force report is also attached hereto as Attachment 2. I did not view the KTVA video

before these reports were submitted and I had no idea what, if anything, the KTVA video captured. During the criminal case, I was copied on emails that Sgt. Nieves and Trooper Miner sent in response to the DA's office questions about whether someone was videotaping Bartlett's arrest.

8. I have seen the KTVA video since Bartlett's arrest. It does not show Bartlett walking toward me. The view of the scene that is depicted is not from the same perspective that I had on the scene, which includes not only what I could see, but also what I could hear and sense. The video shows that Bartlett was close to me before I moved him back. It also shows that Bartlett's conduct caused me to stop talking with the teen. The video shows that Bartlett has a beer in his left hand. It shows the back of Sgt. Nieves as he is approaching within moments of me pushing Bartlett back. My first conscious realization that Sgt Nieves was on scene occurred about when he took Bartlett's arm and gave Bartlett orders. The longer KTVA video does not show Bartlett's right hand, at least partly because the teen is blocking the view. My view of Bartlett's hands was not blocked; Bartlett's right hand was up and near my face. The video shows that Bartlett after not complying with verbal commands to go to the ground, tensed throughout the arrest and went gradually to the ground. At times both Sgt. Nieves and I were near or above Bartlett's head during that process. I recall that it took effort to gain Bartlett's compliance. I do not recall Bartlett being hurt in any way, which the video confirms.

9. I have read ADA Beard's affidavit and I have viewed the enhanced video that he refers to in

paragraphs 6 and 11, which appears to be a slow motion version of a small portion of the other video. The slow motion video shows Bartlett's right hand was already up the moment I placed my palms on his chest, although the view filmed is not as clear as the unblocked view and perspective that I had.

10. At no time did I act with malice toward Russell Bartlett. I did not know Russell Bartlett. My actions toward him were strictly professional, followed my training, and were based on my perceptions at the scene. I believed that I used reasonable force in moving Bartlett back with a single push, which protected all three of us who were within striking distance (me, the teen, and Bartlett). The push did not hurt Bartlett. And Sgt. Nieves and I used reasonable force in arresting Bartlett. He went gradually to the ground and no one was injured. I believe that we had probable cause to arrest Bartlett.

11. I do not recall whether I assisted in handcuffing Mr. Bartlett. If I did, I would have used standard cuffing techniques. I had minimum contact with Bartlett after the arrest. At no time during my contact with Mr. Bartlett did he complain that the cuffs were on too tightly or uncomfortable in any way. Nor did I hear Mr. Bartlett request me or any other trooper present to loosen or adjust his cuffs.

12. At the time of Bartlett's arrest in April 2014, I had never in the line of duty used OC spray, a taser, or discharged my side-arm.

The above twelve paragraphs complete this declaration, and I declare under penalty of perjury that the foregoing is true and correct.

/s/Bryce L. Weight
Bryce L. Weight

JA 230

Exhibit G Attachment 2

SOA 0433 - SOA 0439

Use of force IA No: UOF2014-0069 Received: Apr 15, 2014

Case No: AK14025280

Type of service being performed at time of incident: Arrest

Reason for use-of-force: Officer Safety

Officer assessment of citizen condition: Alcohol

Citizen was injured: No

Citizen was taken to hospital: No

Citizen was charged/arrested in relation to the incident: YesOfficer was injured: No

Officer was taken to hospital: No

Distance Officer was from Involved Citizen: 1 feet to 3 feet

Involved Citizen Build: Large

Involved Citizen Height: 5'7" to 5'9"

Involved citizen:

Russell Paul Bartlett

Resistance(s):

Non-Compliance

Charges against citizen in relation to the incident:

Misdemeanor

Linked address(s):
Home Address: 4040 Old Wood Road Ester AK 99709

Linked phone(s):
Home Phone: (907) 347-1421

Officers involved:

Trooper Bryce L Weight [BLW1/308024]

Officer current info:

Division: State Troopers
Bureau:
Section:

Snapshot - officer information at time of incident:

Badge/ID no: BLW1
Division: State Troopers
Bureau:
Section:
Detachment: B
Post: Palmer
Rank/title: Trooper
Age: Years of employment: Years with unit:
Off duty: Off duty employed:

Use(s) Of Force:

Unarmed: Effective

Sergeant Luis A Nieves [LAN1/305069]

Officer current info:

Division: State Troopers
Bureau:
Section: Recruitment

Snapshot - officer information at time of incident:

Badge/ID no: LAN1
Division: State Troopers
Bureau:
Section: Recruitment
Detachment: HQ
Post: Anchorage
Rank/title: Sergeant
Age: 44 Years of employment: 7 Years with unit:
Off duty: Off duty employed:

Use(s) Of Force:

Unarmed: Effective

Summary:

On 4/13/14 at approximately 0150 hours, I contacted a large party in the Artic Man event area to investigate minors consuming alcohol. At approximately 0157 hours Russell P. Bartlett attempted to stop me from my investigation. I was contacting a 16 year old male. I asked the 16 year old to step to the side of the party so I could speak with him (music was very loud and I smelled alcohol). Once off to the side Russell Bartlett approached me in a hostile manner. I observed him walking towards me with a look of

anger on his face and a quick pace. Bartlett was placing himself and his arms between me and juvenile yelling at me that I had no business contacting the juvenile and that he would not allow it. He put his hands very close to my face, pointing. I attempted to explain to Bartlett what I was doing and why. Bartlett was obviously upset and intoxicated (strong smell of ETOH, slurring, beer in his hand). I could barely get a word out before being interrupted. It was obvious to me that no matter what I said Bartlett was not going to agree and allow me to conduct my investigation. Bartlett came closer to me. I took this act as aggression and I felt threatened. I felt as if Bartlett was about to punch me. I pushed Bartlett back to create distance between him and me. Sgt. Nieves then went hands on with Bartlett, trying to gain control. I also went hands on, and conducted a leg sweep of his right leg. Bartlett continued to not comply, and resist by force. Sgt. Nieves threatened the use of a taser and Bartlett complied at that time. Bartlett was arrested for disorderly conduct and resisting arrest.

When/where:

Date/time occurred: Apr 13 2014 01:50

Home Address: 4040 Old Wood Road Ester AK 99709

Status/assignment information:

Status: Completed

Opened: Assigned: Due: 04/15/2014 Completed: 05/26/2014

Disposition: Within Policy

Unit assigned: Un-assigned
Handled at field/unit level: No
Investigator assign: Un-assigned
Supervisor assign: Un-assigned
Source of information:

Organizational component(s):

Division: State Troopers
Detachment: B
Post: Palmer

BlueTeam chain routings

Apr 15, 2014 21:34: Sent from Trooper Bryce L Weight [BLW1/308024] to Sergeant Luis A Nieves [LAN1/305069]

Instructions:

Blue team use of force incident for your review.

Reviewed by Sergeant Luis A Nieves [LAN1/305069] on Jan 16, 2015 at 16:10

Decision: Approved

Reviewer comment:

[Forwarded by Sergeant Luis Nieves]

CC(s) of this routing were sent to the following:

Apr 16, 2014 08:57: Sent from Sergeant Luis A Nieves [LAN1/305069] to Lieutenant Lawrence R Piscoya [LRP0/264203]

Instructions:

LT here is the blue team report as requested for the Arctic Man incident.

Reviewed by Lieutenant Lawrence R Piscoya [LRP0/264203] on Jan 16, 2015 at 10:07

Decision: Not approved
Missing Information

Reviewer comment:

Sgt. Nieves: Please ensure that all audios for this contact are attached. If there are no audios, for whatever reason, then please forward this back to me.

Apr 16, 2014 10:07: Sent from Lieutenant Lawrence R Piscoya [LRP0/264203] to Sergeant Luis A Nieves [LAN1/305069]

Instructions:

Please add the audio to this incident. If there is no audio, then forward back to me.

Reviewed by Sergeant Luis A Nieves [LAN1/305069] on Jan 16, 2015 at 11:26

Decision: Approved

Reviewer comment:

No audio.

Apr 16, 2014 11:26: Sent from Sergeant Luis A Nieves [LAN1/305069] to Lieutenant Lawrence R Piscoya [LRP0/264203]

Instructions:

> No audio. Our new recorders (Olympus DM-620) do not have the remote controls to activate in a dynamic situation. We must manually pull them out of our vests/shirt pockets, take them off hold (side button), press record (front button on face of recorder; poor design that if not on hold will either start or stop recording due to all control functions being on the face of the recorder [stop, record, pause]), put the recorder back on hold, then return it to our pocket. The current remotes available for this recorder retail at $300.00 (DPS supply does not provide this accessory). No audio due to technical design failure.

Reviewed by Lieutenant Lawrence R Piscoya [LRP0/264203] on Jan 16, 2015 at 08:19

Decision: Approved

Reviewer comment:

[Forwarded by Lieutenant Lawrence Piscoya]

Apr 18, 2014 08:19: Sent from Lieutenant Lawrence R Piscoya [LRP0/264203] to Captain Burke W Barrick [BWB0/250337]

Instructions:

> I asked Sgt. Nieves a few questions. He indicates the person is not known by the campsite renters,

where the party was occurring. He was heavily intoxicated and Sgt. Nieves indicates he was getting closer and closer to the troopers face from his point of view. The subject was aggressive and intoxicated. By the time, Sgt. Nieves arrived, Trp. Weight pushed the subject away and they took him to the ground. Trp. Weight indicates he felt threaten with Mr. Bartlett's aggressive manner as he approached. He stated in his report that at one time, he felt that Mr. Bartlett was going to hit him and felt threatened.

Reviewed by Captain Burke W Barrick [BWB0/250337] on Jan 16, 2015 at 15:12

Decision: Approved

Reviewer comment:

[Forward to OPS by Captain Burke Barrick]

May 28, 2014 07:26: Sent from Investigator Jeffrey R Brown [JRB1/313495] to OPS Staff

Instructions:

Rerouted through the majors.

Reviewed by Investigator Jeffrey R Brown [JRB1/313495] on Jan 16, 2015 at 08:10

Decision: Approved

Reviewer comment:

[Forward to OPS by Investigator Jeffrey Brown]

CC(s) of this routing were sent to the following:

Jun 04, 2014 18:39: Sent from Sergeant Luis A Nieves [LAN1/305069] to Lieutenant Lawrence R Piscoya [LRP0/264203]

Instructions:

For approval and forward to OPS

Reviewed by Lieutenant Lawrence R Piscoya [LRP0/264203] on Jan 16, 2015 at 10:44

Decision: Not approved
Other

Reviewer comment:

This is a duplication. Please delete.

Jun 26, 2014 16:10: Sent from Sergeant Luis A Nieves [LAN1/305069] to Lieutenant Lawrence R Piscoya [LRP0/264203]

Instructions:

For your approval.

Reviewed by Lieutenant Lawrence R Piscoya [LRP0/264203] on Jan 16, 2015 at 10:43

Decision: Approved

Reviewer comment:

for submission.

Aug 19, 2014 10:43: Sent from Lieutenant Lawrence R Piscoya [LRP0/264203] to Lieutenant James A Helgoe [SJAH0/283214]

Instructions:

For submission.

Reviewed by Lieutenant James A Helgoe [SJAH0/283214] on Jan 16, 2015 at 14:53

Decision: Approved

Reviewer comment:

[Forwarded by Lieutenant James Helgoe]

Aug 19, 2014 10:44: Sent from Lieutenant Lawrence R Piscoya [LRP0/264203] to Lieutenant Derek J DeGraaf [DJD2/291490]

Instructions:

This is a duplication of the UOF prior. Please do not retain and delete.

Reviewed by Lieutenant Derek J DeGraaf [DJD2/291490] on Jan 16, 2015 at 08:54

Decision: Approved

Reviewer comment:

[Forward to OPS by Sergeant Derek DeGraaf]

Aug 19, 2014 14:53: Sent from Lieutenant James A Helgoe [SJAH0/283214] to Lieutenant Lawrence R Piscoya [LRP0/264203]

Instructions:

For review

Reviewed by Lieutenant Lawrence R Piscoya [LRP0/264203] on Jan 16, 2015 at 15:02

Decision: Approved

Reviewer comment:

This is a duplication. Please delete this second copy.

Aug 19, 2014 15:02: Sent from Lieutenant Lawrence R Piscoya [LRP0/264203] to Lieutenant Derek J DeGraaf [DJD2/291490]

Instructions:

This is a duplication of another UOF report that is identical. Please delete.

Reviewed by Lieutenant Derek J DeGraaf [DJD2/291490] on Jan 16, 2015 at 08:54

Decision: Approved

Reviewer comment:

[Forward to OPS by Sergeant Derek DeGraaf]

Entered via BlueTeam by: Trooper Bryce L Weight [BLW1/308024] on Apr 15, 2014 at 19:58

Exhibit J

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CIVIL ACTION NO.: 4:15-cv-00004-SLG

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
v.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Defendants.	)
	)

AFFIDAVIT OF RAYMOND BEARD

STATE OF ALASKA	)
	) ss
JUDICIAL DISTRICT	)

1. I am an Assistant District Attorney for the State of Alaska and was assigned to prosecute *State of Alaska v. Russell Paul Bartlett*, Case No. 3GL-14-00025CR. I have been requested to submit this affidavit in connection with Bartlett's civil lawsuit against Bartlett's arresting officers, Alaska State Troopers Luis Nieves and Bryce Weight. I have

personal knowledge of the facts in this affidavit and I am competent to testify.

2. I have served as an Assistant District Attorney for the State of Alaska since February of 2014. My work has involved a range of misdemeanor and felony criminal cases. I am presently assigned as the primary prosecuting attorney for all criminal cases before the Honorable David Zwink in the Palmer District Court, and before the Honorable Daniel Schally and Michael Franciosi in Glennallen Superior and District Courts. The Glennallen Court covers the Paxton area where Mr. Bartlett's case originates.

3. My legal experience and my prior law enforcement experience informed my perspective and analysis of Bartlett's case. Before attending law school, I served about seven years in the United States Air Force as an Advanced Law Enforcement Specialist and Military Working Dog Handler. I am a former instructor of the United States Air Force Security Police Academy and a former instructor of the Department of Defense Dog School. After my military service, I served about nine years as a Police Officer and Field Training Officer with the San Antonio Police Department in Texas, and later about two years as a Police Officer with the Anchorage Police Department in Alaska. I have significant training and experience in police use of force policies, and I have significant experience working large gatherings and festivals where excessive alcohol use is expected.

4. The criminal case against Russell Bartlett arose out of Arctic Man 2014. According to reports, Alaska State Troopers were investigating a group of minors consuming alcohol at a large party. Based on reports,

Bartlett interfered with troopers' activities, threatened Trooper Weight, and was subsequently arrested for disorderly conduct and resisting arrest. Records show that the troopers processed and released Bartlett at the Arctic Man event.

5. Alaska State Troopers refer criminal cases for prosecution to the appropriate District Attorney's Office of the Criminal Division of the Alaska Department of Law. Each case is assigned to a criminal prosecutor who reviews the charging documents and the submitted evidence. The assigned prosecutor has discretion to accept, amend, add, or reject charges as appropriate based upon the law and upon department policy. After conducting an initial review of Bartlett's case, I accepted for prosecution the charges of Disorderly Conduct and Resisting Arrest.

6. My contacts in prosecuting the case were Trooper Sergeant Luis Nieves, Trooper Bryce Weight, and Trooper Joel Miner. Later in the case, I learned that Bartlett claimed that someone had videotaped the arrest. My office followed up on that claim through paralegal Sherese Holliday. Sergeant Nieves and Trooper Miner indicated that one of the news stations may have a video. My office obtained a copy of the edited KTVA video, which I understood was aired as part of a story about troopers at Arctic Man. The edited video depicts images of Sergeant Nieves and other troopers patrolling Arctic Man. A portion of the video shows a portion of Sergeant Nieves' and Trooper Weight's contact with Bartlett. I requested the uncut footage from KTVA, but I was informed that it was no longer available. I was, however, able to obtain from KTVA an enhanced high resolution version of the

edited video. The KTVA video corroborates the troopers' version of the arrest. Bartlett was standing very close to Trooper Weight and to the minor that Trooper Weight was interviewing. Bartlett's left arm was fully extended downward at his side. He was holding a beer can in his left hand. The enhanced video reveals Bartlett's right hand was raised about chest level and was near Trooper Weight when Trooper Weight pushed Bartlett away.

7. I understood that Bartlett asserted that Trooper Weight assaulted him and then covered up that alleged assault by arresting Bartlett. At no time during my work on the case was I persuaded by this argument. I knew that Trooper Weight had prior experience as an airport safety officer and therefore would have had considerable experience communicating with the public. His open-handed defensive response to Bartlett, as shown on the video, was measured and controlled and it did not appear to hurt or injure Bartlett in any way. Based upon my prior law enforcement training and experience, I believe that Trooper Weight reasonably feared that Bartlett's right hand would either grab or strike him. Trooper Weight's defensive response prevented Bartlett from completing the expected contact and it created a safe distance between Trooper Weight and Bartlett. Additionally, during a disputed discovery matter in the criminal case, the superior court viewed Trooper Weight's personnel file *in camera*. The court found "[t]here is nothing in the material that is remotely relevant and discoverable" and the material was not released to Bartlett.

8. On or about December 23, 2014, Bartlett's counsel tendered a proposal to dismiss the case. The

State responded that it would agree to dismiss the case subject to Bartlett agreeing to not institute civil action against the State or any of its involved officers. I proposed that agreement simply because Bartlett's counsel had expressed his belief that the officers assaulted Bartlett. Based upon my conversations with Bartlett's counsel, I suspected that he would initiate a civil suit if the State dismissed the criminal charges. Although I believed there was absolutely no merit to support such a claim, I anticipated that the District Attorney would not approve my travel to Glennallen to conduct a trial on a charge of disorderly conduct and I wanted to protect the State and the officers from a frivolous civil suit. On or about January 27, 2015, Bartlett declined the offer but renewed the request that the State dismiss the criminal matter notwithstanding whether or not a civil action would be filed. On January 27, 2015, I declined writing, "because the State believes the troopers made a valid arrest, it would not agree to dismiss the case and leave the troopers exposed to a potential civil lawsuit. The State indicated that it would agree to dismiss if the possibility of future civil suit was closed. If your client declines dismissal under such terms, then the criminal matter will proceed."

10. On January 28, 2015, I contacted Bartlett's counsel regarding the high resolution copy of the Arctic Man video. Again, the high resolution version of the video made the State's case even stronger. I was confident that the State would prevail at trial and Bartlett would be convicted of disorderly conduct.

11. Ultimately, travel to Glennallen to conduct the trial was not approved due to budgetary issues, so the State dismissed the case. I believed at the time,

and I continue to believe, that probable cause existed to charge Bartlett not only with disorderly conduct and resisting arrest, but also with fear assault and attempted assault. To my knowledge the troopers involved in Bartlett's arrest did not withhold any material information from me. The KTVA video confirmed the troopers' versions of the contact with Bartlett, which was further solidified by the enhanced video I obtained.

/s/ Raymond Beard
Raymond Beard

SUBSCRIBED AND SWORN TO 11/18/2015 at Palmer, Alaska.

[SEAL] /s/Deborahа A. Burchell
Notary Public in and for the State of Alaska
My commission expires: with office

Exhibit A

In The Matter Of:
RUSSELL BARTLETT v.
LUIS NIEVES, et al.,

LUIS NIEVES
July 31, 2015

Metro Court Reporting
405 West 36th Avenue, Suite 201
Anchorage, Alaska 99503
metro@gci.net

* * *

[p.77]

Q ..... before .....

A This part to that and you'll see -- well, that's why I positioned myself around his back 'cause I don't want to get hit in the face.

Q By what?

A By his fist.

Q So, we've already seen the part where he swung his right fist at you?

A Yes, sir. He -- from what I can see he's getting ready to swing and then that's why I stepped around the back of him and that's why I'm -- I get behind him.

Q Okay. And then is this where he's fighting with you?

A Yes, sir. He's tensing up the whole time, that's stuff that you may or may not be able to see on video but he's tensing up, he's pulling away from us and we're holding on for everything we've got on him.

Q Do you give people a second to kind of digest what's occurring whenever you grab a hold of somebody like that?

MS. GALBRAITH MOORE: Objection, foundation.

A He knew he was being contacted by Troopers. At that point there's no -- he was being placed under arrest. He -- he was already creating a hazardous situation, he's going to jail.

Q (By Mr. Wilson) So, at -- I mean, at the very moment that you guy -- that Trooper Weight decides to push Mr.

[p.78]

Bartlett, Mr. Bartlett is standing there, correct?

A No, he's trying to clear Mr. Bartlett from attacking him which is what my perception was as well. I -- we both felt that -- I felt that Trooper Weight was in danger and Trooper Weight clearing him that's clear to me that Trooper Weight also felt that he was in danger at that point. Your client was being unreasonable and was creating a hazardous situation and it was only a matter of time before he struck my Trooper so we stopped it.

Q You're not a mind reader, are you?

MS. GALBRAITH MOORE: Objection, form of the question .....

A Unh-unh (negative).

MS. GALBRAITH MOORE: ..... and foundation.

Q (By Mr. Wilson) I just wanted to make sure that we're all on the same page.

A Well, that's kind of an insulting question but .....

Q Are -- do you claim to have some ability to read people's minds?

MS. GALBRAITH MOORE: Same objection.

A It's a -- that's an offensive .....

MS. GALBRAITH MOORE: It's an .....

Q ..... question.

MS. GALBRAITH MOORE: ..... objective standard, ...

MR. WILSON: Well --

* * *

[p.97]

A Yeah. It .....

Q Are you telling me it's unimportant that Trooper Weight told Mr. Bartlett to leave before he pushed him in the chest?

A Ah, this is to the best of his recollection. You're going to have to interview Trooper Weight.

Q Well, I'm asking you the question. Okay?

A And -- and my answer to that is that this appears to be to the best of his recollection at the time.

Q Would you agree with me that that certainly is an important detail in this situation here?

A It's an addition -- it -- it's an -- an additional important piece but there's more than enough here.

Q And you would agree with me that again if we're talking about what you were trained, et cetera, that a person, a police officer would want to put that important detail in his police report, correct?

A And I think that he -- he did the best that he could at 4:00 o'clock in the morning if we're looking at the facts.

Q The -- the -- Trooper -- I want to make sure I understand this and make sure -- did -- do -- do you claim that Russell tried to head butt you?

A It was hard to determine. I -- I -- I believe that he was trying to hurt me and hurt my -- my Trooper.

[p.98]

Q I have a very specific question for you.

A Do I believe that he was trying to head butt me?

Q Do you believe that Mr. Russell attempted to head butt you?

A Yes, based off of my Trooper's observations, yes.

Q Did you perceive something? Let's not -- let's set aside for a minute what Trooper Weight says to you.

Okay. Did you perceive that Mr. Bartlett tried to head butt you?

A No, I perceived .....

Q Mr. Bartlett?

A ..... he was trying to punch me in the face.

Q Okay. But -- so, is the answer you did not perceive that Mr. Bartlett tried to head butt you?

A It's hard to say.

Q Well, it would be a yes or a no.

A I have to -- in the -- in this case I have to go off of what my Trooper's observation were.

Q Mr. Nieves, I'm asking you what you perceived, okay? I don't want to hear about what Trooper .....

A Yeah, but the .....

Q ..... Weight said.

A ..... Trooper .....

Q Hold -- I'm asking .....

A ..... his credibility .....

Q ..... you .....

[p.99]

A ..... is there.

Q I'm asking you what you perceived.

A I perceived that I was in danger and I .....

Q And let me .....

A ..... was going to be attacked.

Q ..... let me finish my question. I'm asking you whether you perceived what -- that Mr. Bartlett attempted to head butt you?

A I beli -- yeah, I -- I believe he may have. That's why I positioned myself behind him.

Q So, your testimony is you did perceive that Mr. Bartlett attempted to head butt you?

A My testimony is that I believed that he was going to hurt me by any means necessary to prevent me from placing him under arrest.

Q Okay. Let -- I'm going to -- okay. I just -- can you just answer my question if you could, please?

A I'm answering it.

Q Okay. Did you perceive Mr. Bartlett to do something that you perceived as an effort to head butt you?

A It's hard to say now. I mean, I -- what I know is that I perceived based off of looking at the video standing behind him that he was getting ready to punch me.

Q Did you perceive that Mr. Bartlett attempted to head butt you?

[p.100]

MS. GALBRAITH MOORE: Objection, asked and answered.

MR. WILSON: Not asked and answ -- asked many times, not answered yet.

A I believe he may have ha-- harmed me in any which way that he could of. So, at that point I thought that he was going to harm me in any way that he could have and that's why I positioned myself the way I did behind him and that's why we did everything we could to get him down to the ground and that's why we placed him in custody.

Q (By Mr. Wilson) I'm going to ask you one more time and then I'm going to take this -- when we get this deposition taken I'm going to go to the court and I'm going to have to take -- raise this issue with the court. Okay. I want you to just answer my question.

A Okay.

Q As you were at the Arctic Man did you perceive in the course of your interaction with Mr. Bartlett that Mr. Bartlett attempted to head butt you?

MS. GALBRAITH MOORE: Objection, asked and answered.

A I've answered you already. I believe .....

Q (By Mr. Wilson) That's a yes or a no.

A ..... I believe that he would have head butted me at one point or another.

Q I'm not asking you to try to read his mind, my question to you is whether or not you perceived an action on the

[p.101]

part of Mr. Butler -- Mr. Bartlett that you interpreted as an attempt by Mr. Bartlett to head butt you?

A I have to say yes based off of my reaction.

Q And this attempt to head butt you is -- would have occurred on the time frame that we have this video here, correct?

A Right.

Q Did you perceive some point in time where Mr. Bartlett was quotes, unquotes: His chest was almost touching Mr. Weight?

A He was close enough.

Q My – that's – my question is, did you perceive at some point where Mr. Bartlett's chest was quotes: Almost touching?

A Yes.

Q And is that on this video also?

A I believe it is.

(Pause - reviewing documents)

MR. WILSON: (Whispering to self).

Q As far as the policies go, isn't it the policy of the Troopers that before a Trooper engages a person physically they should verbally tell them to step back, get away from me, move on, et cetera?

MS. GALBRAITH MOORE: Objection, form, foundation.

A It would depend on the scenario. We should -- we should

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* * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA AT FAIRBANKS

Case No. 4:15-cv-4 SLG

[Filed March 15, 2016]

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
v.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Defendants.	)

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

While at Arctic Man, Russell Bartlett attended a party at Jerry Sadler's campsite with his friend David Krack and Krack's teenage cousin, MacCoy Walker.[1] At the Sadler party Luis Nieves, an Alaska State Trooper, approached Bartlett and asked to speak with him, but

[1] Ex. A (Deposition of David Krack) [Tr. 5:16-24]; Ex. B (Deposition of MacCoy Walker) [Tr. 5:9-25].

Bartlett lawfully refused, angering Nieves.[2] Some minutes later, Bartlett observed another trooper, Brice Weight, interrogating his friend's cousin, so Bartlett approached Weight and voiced his opinion that Weight had no authority to interrogate Walker without a parent or guardian present.[3] At that point Nieves – riled by Bartlett's earlier refusal to engage him in conversation – decided Bartlett, beer in hand, was "getting ready to attack Weight," so Nieves went over to lend assistance.[4]

Emboldened by the arrival of Nieves and John Thain, a cameraman who filmed the entire altercation, Weight suddenly steps forward and forcefully shoves Bartlett without warning. The two troopers – retaliating against Bartlett for challenging their authority in front of a rolling video camera and several onlookers – take Bartlett roughly to the ground while threatening him loudly. The sudden unexpected display of force causes young Walker's pulse to quicken, and he begins to shake.[5] Bartlett can be heard on the video after his arrest incredulously demanding to know why he was arrested.[6]

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[2] Ex. C (Deposition of Russell Bartlett) [Tr. 62:1-63:15]; Ex. D (Deposition of Luis Nieves) [Tr. 65:2-66:24].

[3] Ex. C [Tr. 76:22-78:14].

[4] Ex. D [Tr. 80:4-83:12].

[5] Ex. B [Tr. 26:1-29:7].

[6] Doc 22-2, Exhibit A (video) at 02:25-02:33.

Weight and Nieves then drew up false police reports to justify their unlawful, retaliatory conduct against Bartlett, charging him with disorderly conduct and resisting arrest when no reasonable Alaskan police officer would have done so. Bartlett expended in excess of $7,000 defending himself against these baseless charges[7] and, when the charges were finally dropped after nearly 10 months, Bartlett initiated this lawsuit under 42 U.S.C. § 1983 to hold Nieves and Weight personally liable for their incompetence and knowing violations of law.

I. SUMMARY JUDGMENT STANDARD

When determining a motion for summary judgment, "courts are required to view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion.'"[8] "In qualified immunity cases, this usually means adopting . . . the plaintiff's version of the facts."[9] Summary judgment should not be granted "if a rational trier of fact could resolve a genuine issue of material fact in the nonmoving party's favor . . . 'because credibility determinations, the weighing of the evidence, and the

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[7] Ex. E.

[8] *Scott v. Harris*, 550 U.S. 373, 378 (2007) (alterations in original) (quoting *United State v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

[9] *Id.* at 378.

drawing of legitimate inferences from the facts are jury functions, not those of a judge.'"[10]

"When opposing parties tell two different stories, one of which is blatantly contradicted by [an undisputed video], so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."[11] Because Bartlett is the non-movant, his "evidence . . . is to be believed, and all justifiable inferences are to be drawn in his favor."[12]

II. Construed in Bartlett's Favor, the Facts Permit a Reasonable Jury to Find that Weight and Nieves acted Unreasonably in Arresting Bartlett and Promoting his Prosecution.

The facts presented in the criminal complaint, police reports, and declarations of Nieves and Weight are directly refuted multiple times by the video evidence and witness testimony collected to date. The State attempts to portray Bartlett as boisterous, inebriated, and aggressive. But after considering the evidence presented below – including the undisputed video – reasonable jurors could conclude Nieves and Weight grossly exaggerated and deliberately mischaracterized Bartlett's conduct to justify their use

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[10] *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2011) (quoting *Nelson v. City of Davis*, 571 F.3d 924, 927 (9th Cir.2009)).

[11] *Scott*, at 380.

[12] *Blankenhorn v. City of Orange*, 485 F.3d 463, 470 (9th Cir. 2007) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

of force against him, which was prompted by no more than Bartlett's questioning of their authority.[13] "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."[14] Bartlett was well within his constitutional rights to act as he did, but the reaction of Nieves and Weight was unreasonable and excessive.

A. Reasonable jurors could find that Bartlett never yelled at Nieves near Sadler's RV; that Bartlett simply refused to speak to Nieves; and Nieves took umbrage to this refusal.

There is no reasonable basis for Nieves' statement in his supplementary report that "Bartlett began to shout to Sadler and the occupants of the RV that they did not have to speak with me or allow me in the RV."[15] First, the video previously submitted to the court[16] establishes that, at least for that portion of the video during which Nieves spoke to the occupants of the RV,

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[13] *See* Ex. F (report of expert D.P. Van Blaricom) at 10 (stating that individuals who question the authority of police are much more likely to have force used against them and be arrested on trumped-up charges than those who are compliant and polite to police questioning); *see also* Ex. G (Affidavit of Van Blaricom).

[14] *Houston v. Hill*, 482 U.S. 451, 462-63 (1987).

[15] Doc. 7-1 at 4.

[16] Doc 22-2, Exhibit A (video).

Bartlett is not shouting.[17] Further, Jerry Sadler, Jr., the owner of the RV, testified at his deposition that Bartlett never shouted at anyone during Sadler's contact with Nieves.[18] This is confirmed by the Affidavit of Sierra Contento,[19] who was present in the RV and opened to door to speak to troopers. John Thain, the cameraman who filmed the video and who had followed Nieves during his patrol that night, did not recall Bartlett screaming at the RV's occupants,[20] and Bartlett also testified he did not scream at Nieves or the RV's occupants.[21] According to those present at the RV, Bartlett never hollered to them that they were not required to interact with Nieves.

After Nieves finished his contact with the folks in the Sadler RV, he approached Bartlett and stated that he wanted to ask him a few questions.[22] In response, Bartlett asked about what, and Nieves developed an attitude.[23] In light of Nieves' attitude Bartlett simply

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[17] Video at 1:54-2:00.

[18] Ex. H (Deposition of Jerry Sadler, Jr.) [Tr. 9:2-12:25].

[19] Ex. I; *see also* Ex. B [Tr. 11:13-25] (stating troopers were yelling at the RV entrance but that Bartlett was not).

[20] Ex. J (Deposition of John Thain) [Tr. 18:9-19:18].

[21] Ex. C [Tr. 68:13-69:1].

[22] Doc. 7-1 at 4.

[23] Ex. C [Tr. 62:1-63:12].

advised Nieves that he did not wish to speak with him.[24] At no time was Bartlett "hostile" to Nieves.[25]

What is more, when deposed Nieves stated that he does not make charging decisions based on whether an individual has cooperated with him.[26] But Nieves is depicted in the Arctic Man video declining to ticket a man for driving a motorbike without headlights because that man had been "so polite" to Nieves.[27] A reasonable jury could therefore infer that Bartlett's lawful refusal to speak with Nieves rubbed Nieves the wrong way and was a significant factor in Nieves decision to later rush at Bartlett, assault him, and then falsify the police report to manufacture probable cause – in part by claiming that Bartlett had earlier yelled at the RV's occupants. "[P]olice officers . . . may not exercise their authority for personal motives, particularly in response to real or perceived slights to their dignity."[28]

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[24] Ex. C [Tr. 62:10-63:5]; see also Doc. 7-1 at 4.

[25] Ex. C [Tr. 62:1-63:12].

[26] Ex. D [Tr. 20:25-22:5].

[27] Video at 0:45-0:54.

[28] *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990); *see also* Ex. F at 6 ("Unnecessary use of force is often tied to an officer's adrenalin or anger.").

B. A reasonable jury could find that Bartlett did not "charge" up to Weight and Walker; that Bartlett's proximity to them was reasonable given the blaring music; and that Bartlett did not come between Weight and Walker.

When Bartlett noticed Weight speaking with Walker, Bartlett simply walked over to them.[29] Nieves writes in his supplemental report, "I observed Bartlett walking towards Trooper Weight."[30] But in his later declaration, Nieves writes, "I saw Bartlett *charge* toward Trooper Weight and a teen."[31] Weight writes that Bartlett approached him "in an aggressive manner" with "a look of anger."[32] The contact between Weight and Bartlett was observed, pointblank, by Walker and Krack, who can be seen in the video both before and after Bartlett was assaulted by Nieves and Weight.[33] Walker and Krack each testified that Bartlett did not do anything that could be perceived as threatening. According to Walker, Bartlett did not look angry, hostile, or combative, and Bartlett was not slurring his speech.[34] According to Krack, Bartlett's proximity to Weight did not appear threatening

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[29] Ex. C [Tr. 78:1-10]; Ex. A [Tr. 51:1-8]; Ex. B [Tr. 19:4-22].

[30] Doc. 7-1 at 4.

[31] Doc. 44-2 at 3 (emphasis added).

[32] Doc. 7-1 at 3.

[33] Video 2:05, 2:21.

[34] Ex. B [Tr. 22:9-24:13].

because it was necessary to communicate above the loud music.[35]

Once Bartlett arrived to where Weight was questioning Walker, Bartlett expressed his opinion to Weight that he was not allowed speak to a juvenile without his parents present.[36] While Bartlett did so somewhat loudly, the volume of his voice was necessitated by the blaring music, which had driven everyone at the Sadler party to stand close to each other to facilitate communication. In the context of the blaring music, Bartlett's voice was not louder than necessary to communicate with Weight.[37]

Weight averred in support of the complaint against Bartlett that Bartlett "put his arm between me and the juvenile and informed me that I could not speak with the juvenile."[38] Weight reiterated this assertion during his deposition,[39] but in his subsequent declaration, he simply states that "Bartlett got close to me and the

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[35] Ex. A [Tr. 35:11-21].

[36] Ex. C [Tr. at 78:12-14].

[37] Ex. A [Tr. 35:12-14] ("You had to get right next to somebody to hear what they were saying or to talk to them."); Ex. B [Tr. 26:16-17] ("The trooper was just as loud as [Bartlett] it seemed like to me. We all kind of had to raise our voices."); *see also* Ex. J [Tr. 34:24-25; 55:5-6] ("It wasn't that unusual for people to stand close because the music was very loud.").

[38] Doc. 7-2 at 5.

[39] Ex. K (Deposition of Brice Weight) [Tr. 36:20-37:19] ("[Bartlett] absolutely put himself between me and the teenager. . . .").

teen."[40] But Walker and Krack testified that Bartlett never "tried to get between [Walker] and [Weight],"[41] and the video corroborates this testimony.

Construed in Bartlett's favor, the facts establish that Bartlett approached Weight and Walker at a normal pace, that Bartlett was not threatening or aggressive but instead spoke loudly to be heard over the music, and that Bartlett never inserted himself between Weight and Walker. Bartlett merely informed Weight of his opinion that Walker, a minor, could not be interviewed without parental consent. On these facts reasonable jurors could infer that Nieves and Weight falsified their police report and complaint against Bartlett to justify their provocative conduct toward him. It is well established that police "may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment."[42]

C. A Reasonable jury could find that Bartlett's right hand only came up in reaction to Weight's shove and that Bartlett maintained the same distance from Weight until the shove.

Bartlett's right hand was never raised toward Weight in a threatening manner. Weight's initial report

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[40] Doc. 47-8 at 3.

[41] Ex. B [Tr. 22:22-23:3]; Ex. A [Tr. 53:20-21]; *see also* Ex. L (Affidavit of Russell Bartlett); Ex. F at 7-8 (highlighting false statements in police report).

[42] *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990).

is silent on this matter, and Nieves noted only that Bartlett was "within an arm's length" of Weight.[43] At his deposition Bartlett testified that his right hand rose only in reaction to Weight's shove but that before being shoved, his right hand was close to his hip.[44]

Nieves claims in the police report that "Bartlett began to close [on] Trooper Weight, resulting in Trooper Weight pushing him away."[45] The video firmly establishes that Bartlett was not closing in on Weight when he elected to shove Bartlett. In fact, the enhanced video submitted to the court establishes that the assault was precipitated by the arrival of Nieves and the video camera. The enhanced video clearly shows Weight looking up and observing Sgt. Nieves' arrival, returning his gaze back to Bartlett, and then shoving Bartlett.[46] But the arrival of another trooper should have made Weight feel safer rather than more eager to use force, and trooper policy for Arctic man – as well as common sense – recognizes that troopers are safer in pairs.[47] Believability of the defendant's version of events hinges on the fact finder accepting that the arrival of Nieves and the camera had nothing to do with Weight's assault on Bartlett: this assertion is simply not credible.

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[43] Doc. 7-1 at 3-4.

[44] Ex. C [Tr. 83:8-84:13].

[45] Doc. 7-1 at 4.

[46] Doc. 47-9 (enhanced video at 00:02-00:09).

[47] Ex. M (Deposition of Lawrence Piscoya) [Tr. 62:5-13; 63:10-15; 60:13-24]; Doc. 47 at 3 & n.6 (policy).

Weight asserts in the police report that "Russell stepped forward to where his chest was almost touching mine, and his face very close to mine. I took this action by Russell to be combative in nature. I placed both hands on Russell's chest and pushed him away from me."[48] Weight's allegations are not only disputed by the deposition testimony of Bartlett, Walker, and Krack, but they are flatly repudiated by the video. The video establishes that Trooper Weight had to step forward to shove Bartlett, that Bartlett's chest was not almost touching Trooper Weight's, and that his face was not "very close to Trooper Weight's." Bartlett was never chest to chest with Weight,[49] but was equidistant from both Weight and Walker.[50] Walker recalls that Weight had to take a step forward before shoving Bartlett.[51] In his later declaration, Weight does not allege that Bartlett was chest to chest or face to face with him.[52] Bartlett testified at his deposition that Weight "lunged *forward* at me and struck me with force with both his palms of his hands against my chest."[53]

Construing the facts in Bartlett's favor, and drawing all reasonable inferences therefrom,

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[48] Doc. 7-1 at 3.

[49] Ex. B [Tr. 22:13-18].

[50] Ex. A [Tr. 53:17-19].

[51] Ex. B [Tr. 23:15-19].

[52] Doc. 47-8 at 3.

[53] Ex. C [Tr. 84:19-20] (emphasis added).

reasonable jurors could find that Bartlett never raised his hand threateningly to Weight and that Bartlett, once he arrived at a close enough distance to communicate with Weight, never moved in any closer. The video clearly shows Weight stepping *forward* in order to shove Bartlett.

D. A reasonable jury could find that after being shoved by Weight, Bartlett did not "come at" Weight, did not throw any punches, did not attempt to head-butt anyone, and was never advised he was under arrest.

Weight writes in the police report that after he shoved Bartlett, Bartlett "came at [him] again."[54] The video flatly repudiates this assertion. Weight conceded at his deposition that this statement was inaccurate and reflected only his "belief" that Bartlett *would have* come at him again had Nieves not grabbed Bartlett's arm.[55] Weight's subjective, hypothetical *belief* that Bartlett *would have* "come at him again" has no bearing on the fact that Bartlett did no such thing.

Nieves' claim that he "immediately grabbed a hold of Bartlett and advised him that he was under arrest for disorderly conduct"[56] is also demonstrably false when compared to the video. At no time on the video

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[54] Doc. 7-1 at 3.

[55] Ex. K [Tr. 54:10-56:21].

[56] Doc. 7-1 at 4.

did Nieves advise Bartlett that he was under arrest.[57] Nieves next claims that Bartlett clenched his right fist as Nieves grabbed Bartlett's left arm.[58] Again, the video flatly contradicts this portion of Nieves' report. Nieves then asserts that he "advised [Bartlett] again that he was under arrest, as he pulled away from me, as he swung his right fist towards me."[59] Yet again, the video refutes these assertions. Nieves never told Bartlett that he was under arrest, and the video fails to reveal Bartlett pulling away from Nieves in any significant way or swinging his right fist towards Nieves. Nieves then asserts that Bartlett "continued to fight with us" until Trooper Miner arrived and Nieves threatened to deploy a taser.[60] Trooper Miner is not depicted in the video, and nothing in the video could possibly be construed as Bartlett "fighting" with either Nieves or Weight.

Weight also asserts in the police report that Nieves informed Bartlett he was under arrest.[61] Again, a review of the video establishes that this is simply not true. Weight next contends that "Russell continued to resist and struggle as Sgt. Nieves and I attempted to gain control of his arms and place him in handcuffs."[62]

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[57] *See* video at 2:03-2:33.

[58] Doc. 7-1 at 4.

[59] Doc. 7-1 at 4.

[60] Doc. 7-1 at 4.

[61] Doc. 7-1 at 3-4.

[62] Doc. 7-1 at 4.

In fact, the video establishes that after seizing Bartlett, the troopers at all times had control of Bartlett's arms and that Bartlett voluntarily put his hands behind his back so he could be cuffed. Weight also asserts that "Russell attempted to head butt Sgt. Nieves, but was unsuccessful."[63] Not only is this contradicted by Bartlett's affidavit[64] and the deposition testimony of Walker, Krack, and Thain,[65] it is flatly contradicted by the video. The subsequent declarations of Weight and Nieves, sworn to under penalty of perjury, are tellingly silent on whether Bartlett was throwing punches or attempting head-butts during the altercation.[66]

Reasonable jurors could find that Bartlett never "came at" the troopers, never threw punches, and never attempted to head-butt anyone. The only reasonable inference to be drawn from the demonstrably false statements Weight and Nieves inserted into their police report and complaint against Bartlett is that Weight and Nieves deliberately manufactured probable cause to justify their provocative conduct toward Bartlett, who was merely expressing his belief that Weight had no right to question Walker absent parental consent, and who had earlier told Nieves that he did not wish to speak with him. "[A]n expression of disapproval toward a police officer . . . f[alls] squarely

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[63] Doc. 7-1 at 4.

[64] Ex. L.

[65] Ex. A [Tr. 54:1-58:19]; Ex. B [Tr. 26:7-28:18]; Ex. J [Tr. 57:5-60:17].

[66] Doc. 44-2 at 4; Doc. 47-8 at 3.

within the protective umbrella of the First Amendment and any action to punish or deter such speech – such as stopping or hassling the speaker – is categorically prohibited by the Constitution."[67]

E. Reasonable jurors could conclude that Bartlett was not "highly intoxicated" during his interaction with Weight and Nieves.

Weight asserts in both the police report and complaint that Bartlett "was slurring his speech" when talking to Weight.[68] In his subsequent declaration Weight builds on this theme and characterizes Bartlett as "obviously intoxicated."[69] For his part, Nieves' supplementary report is silent as to whether Bartlett appeared to have been drinking.[70] But in his declaration filed with this court nearly 21 months after the altercation, Nieves avers: "I believed that Bartlett was highly intoxicated and hostile to troopers."[71]

Once again, the video directly refutes these assertions. After the arrest Bartlett can be heard disputing the reasons for his arrest, and his

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[67] *Duran v City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990).

[68] Doc 7-1 at 3; Doc. 7-2 at 5.

[69] Doc. 47-8 at 3.

[70] Doc. 7-1 at 4.

[71] Doc. 44-2 at 3.

enunciation is clear and unimpaired.[72] Bartlett testified at his deposition that between 5:00 and 10:00 pm on the night of his arrest, he ate dinner and drank 2 or 3 beers at his campsite.[73] Walker testified that before the party neither Krack nor Bartlett had consumed very much alcohol and that neither man appeared intoxicated.[74] Krack testified that during the night in question, Bartlett's speech was clear and his coordination was unimpaired.[75] From these facts, reasonable jurors could conclude that Bartlett was not "highly intoxicated" during his interaction with Weight.

F. Reasonable jurors could legitimately infer that Nieves and Weight willfully failed to disclose the existence of the Video because it contradicts their false version of the altercation.

The criminal complaint was filed against Bartlett on April 14, 2014.[76] In a use of force report from April 15, 2014, Lieutenant Lawrence Piscoya asked whether Nieves had audio of the arrest, to which Nieves replied in the negative, asserting that his audio recorder was

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[72] Video at 2:25-2:38. Audio from Officer Pugh, who unlike Nieves and Weight activated his recorder, captures Bartlett speaking to an officer after his arrest, and his speech is clear. Ex. N.

[73] Ex. C [Tr. 51:2-52:7]; *see also* Ex. L.

[74] Ex. B [Tr. 8:13-9:5].

[75] Ex. A [Tr. 56:6-57:8].

[76] Doc 7-2 at 1.

too cumbersome to activate before the encounter.[77] The Department of Public Safety procedure manual, however, states that "as with all suspect interviews, it is suggested that officers record the non-custodial interview whenever possible,"[78] and audio exists from two other officers who patrolled Arctic Man that night.[79] Piscoya, who has nearly 23 years' experience as an Alaska State Trooper, testified it is highly unusual to have a criminal case with no audio recording.[80]

When deposed, Nieves testified in some detail about a news crew camera man, John Thain, who had been authorized to accompany Nieves during Arctic Man. Nieves stated, "Lieutenant Piscoya directed me to have the news crew ride with me."[81] Nieves further testified that Thain had been accompanying him at Arctic Man for "several hours" and that he was aware of Thain videotaping him during the Sadler party.[82] Nieves also testified that Thain had placed a wireless mic on him.[83] According to Thain, Nieves knew Thain was filming

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[77] *Compare* Doc. 44-7 at 14-15, *with* Ex. M [Tr. 19:4-9] (troopers have never complained to Piscoya that recorders are hard to use).

[78] Ex. O at 1.

[79] Ex. N; Ex. P.

[80] Ex. M [Tr. 5:15-18] (experience); [Tr. 17:21-18:4] (more than 95% of criminal cases have audio recordings).

[81] Ex. D [Tr. 28:11-12].

[82] Ex. D [Tr. 30:2-25].

[83] Ex. D [Tr. 30:17-25].

and following him all night.[84] The police report fails to mention Thain's video at all, but a reasonably competent Alaskan trooper would have documented the existence of such a video in the police report.[85]

On May 5, 2014 Bartlett, through counsel, requested discovery from the state, including any and all videotapes taken at the scene.[86] In late May, 2014 a paralegal from the DA's office in Palmer emailed Weight and asked him whether there was any audio for the criminal case against Bartlett, and Weight promptly responded that there was not.[87] On July 16, 2014 Bartlett made a request through counsel to ADA Beard for the contact information of anyone who took video of Bartlett's arrest.[88] The next day the State's paralegal emailed Weight and Nieves and asked if "there is a video floating around of the arrest," and Nieves replied, "Channel 2 perhaps. Nothing in our possession or under our control."[89]

A month later ADA Beard finally responded to Bartlett's request, stating that there was no audio of

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[84] Ex. J [Tr. 21:20-22:23].

[85] *See* Ex. Q (Deposition of Michael Ingram) [Tr. 43:20-46:17].

[86] Ex. R at 1-2.

[87] Ex. R at 3-4.

[88] Ex. R at 5.

[89] 89 Ex. R at 6-7.

Bartlett's arrest.[90] Beard asserted he was unaware that the incident had been filmed, even though a paralegal in his own office had learned one month prior to Bartlett's request that news footage existed.[91] Beard never disclosed to Bartlett the fact that Nieves believed news footage of the incident existed. On October 1, 2014 Bartlett fortuitously found footage of his arrest on youtube and forwarded the link to his counsel.[92] When Beard finally saw the video, he emailed Nieves and stated: "I watched the video clip that is on KTVA's website. I don't like the editing of it. I would like to get the original footage."[93]

G. Reasonable Jurors could conclude that Weight and Nieves lied to ADA Beard to encourage continued prosecution of the case.

Beard contacted Weight by email asking whether Weight could identify the "unknown minor" and whether that minor had any association with Bartlett.[94] Weight replied that he had spoken with both Walker and Krack following Bartlett's arrest, but each denied knowing Bartlett.[95] In fact, neither Walker nor Krack

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[90] Ex. R at 8-9.

[91] Ex. R at 6-7.

[92] Ex. R at 10.

[93] Ex. R at 11.

[94] Ex. R at 12.

[95] Ex. R at 12.

ever made such a statement because both had attended the party with Bartlett, knew Bartlett, and were never questioned by Weight as to their relation to Bartlett.[96] On these facts, reasonable jurors could infer that Weight intentionally misrepresented Bartlett's relationship with Krack and Walker to make it appear as though Bartlett had voiced concern over a stranger being interviewed by police, when in fact Bartlett and Walker were friends.

And, as set forth above, the facts demonstrate that Bartlett never yelled at Nieves or the RV's occupants; did not position himself between Weight and Walker; never attempted to harm Weight and Nieves during the arrest; and was not highly intoxicated. From the numerous inconsistencies, embellishments, and falsehoods in the police report and complaint, reasonable jurors could infer that Weight and Nieves maliciously misled Beard to prosecute a meritless case against Bartlett.

III. ARGUMENT

To determine whether police officers are entitled to qualified immunity, courts employ a two-pronged analysis: "(1) whether the facts alleged show that the officer violated a constitutional right; and (2) if so, whether that right was clearly established at the time

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[96] Ex. A [Tr. 13:3-6]; Ex. B [Tr. 29:13-30:7] ("I would have never said that [I didn't know Bartlett], because I knew him from – we've been – we were together for at least two days prior to this incident, you know, and we've met prior at a friend's house barbeque, so . . . .").

of the event."[97] The first prong requires determining whether, "taken in the light most favorable to the party asserting injury, the facts alleged show the officer's conduct violated a constitutional right."[98] The second prong – whether the right was clearly established – requires determining "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[99] "The linchpin of qualified immunity is the reasonableness of the official's conduct," viewed objectively and "'assessed in light of the legal rules that were clearly established at the time'" of the conduct.[100]

A. Reasonable Jurors Could Find that Bartlett was Falsely Arrested.

"It is undisputed that the Fourth Amendment, applicable to the states through the Fourteenth Amendment, prohibits an officer from making an arrest without probable cause."[101] If there was no probable cause for Bartlett's arrest, Weight and Nieves may still be entitled to qualified immunity, but only if "it is *reasonably arguable* whether there was probable cause"

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[97] *Rosenbaum v. Washoe Cnty*, 663 F.3d 1071, 1075 (9th Cir. 2011).

[98] *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

[99] *Garcia v. Cnty of Merced*, 639 F.3d 1206, 1208 (9th Cir. 2011).

[100] *Rosenbaum*, 663 F.3d at 1075-76 (quoting *Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987)).

[101] *MacKinney v. Nielsen*, 69 F.3d 1002, 1005 (9th Cir. 1995).

for Bartlett's arrest.[102] In other words, "if officers of reasonable competence would have to agree that the information possessed by [Weight and Nieves] at the time of [Bartlett's] arrest did not add up to probable cause," then Weight and Nieves are not entitled to qualified immunity.[103] When "an otherwise competent officer . . . make[s] an unreasonable decision or make[s] an unreasonable mistake as to law or fact," that officer should be liable under § 1983.[104]

The probable cause analysis in the context of § 1983 involves both the facts "known to the officer at the time of the arrest" and "the criminal statute[s] to which those facts apply,"[105] meaning the criminal statutes of Alaska. "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge, and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."[106] "Probable cause is lacking if the circumstances relied on are

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[102] *Rosenbaum*, 663 F.3d at 1076 (9th Cir. 2011) (emphasis in original).

[103] *Id.* (quoting *Jenkins v. City of New York*, 478 F.3d 76, 87 (2d Cir. 2007)).

[104] *Id.* (citing *Liberal v. Estrada*, 632 F.3d 1064, 1078 (9th Cir. 2011)).

[105] *Id.*

[106] *McCoy v. State*, 491 P.2d 127, 129 (Alaska 1971) (alterations in original) (quoting *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949)).

'susceptible to a variety of credible interpretations not necessarily compatible with nefarious activities.'"[107] While "police may rely on the totality of facts available to them in establishing probable cause, they also may not disregard facts tending to dissipate probable cause."[108] "The existence of probable cause necessarily turns upon the particular facts of the individual case, and prior decisions generally are of little help in deciding a specific case."[109]

1. Interference with an investigation is not a crime.

The State's argument is replete with the allegation that Bartlett "interfered" with Weight's ongoing investigation of Walker.[110] But the State cites no Alaska Statute criminalizing interference with a police investigation. To the extent that the State argues Bartlett's alleged "interference" establishes probable cause for his arrest, this argument should be rejected.

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[107] *United States v. Moore*, 483 F.2d 1361, 1363 (9th Cir. 1973) (quoting *United States v. Selby*, 407 F.2d 241, 243 (9th Cir. 1969)).

[108] *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1024 (9th Cir. 2009) (quoting *United States v. Lopez*, 482 F.3d 1067, 1073 (9th Cir. 2007)).

[109] *John v. City of El Monte*, 515 F.3d 936 (9th Cir. 2007).

[110] *Compare* Doc. 47 at 2 ("Bartlett interfered with a trooper's investigation"), 3, 9, 14, 22, 24, 26, 29, 35 ("Bartlett undisputedly interfered with Trooper Weight's investigation."), 45, *with* Ex. S (Deposition of Raymond Beard) [Tr. 71:7-75:15] (ADA Beard's testimony that Bartlett's interference with Weight's investigation was not a crime); Ex. M [Tr. 64:5-11] (same).

Alaska Statute 11.81.400 makes it illegal to "use force to . . . interfere with the arrest of another by a peace officer . . . ." But this statute is inapplicable because at the time Bartlett approached Weight and Walker, Weight was not in the process of arresting Walker. Weight had at best a reasonable suspicion that Walker was a minor who had been consuming alcohol, and Weight was questioning Walker to establish probable cause for a potential arrest, but no arrest occurred as Walker had not been drinking.[111]

Alaska Statute 11.56.780 criminalizes "hindering prosecution," which is defined as "render[ing] assistance to another who has committed a crime . . . with intent to . . . hinder the apprehension, prosecution, conviction, or punishment of the other person. . . ." Because Walker committed no crime, this statute is also inapplicable.

Without citing an Alaska Statute, the state cannot repeatedly imply that Bartlett's conversation with Weight was somehow criminal and therefore established probable cause under Alaska Law for Bartlett's arrest. "Criticism of the police is not a crime,"[112] and police "must respect the right of individuals in their community to question their government and the role of the police."[113]

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[111] Ex. K [Tr. 25:13-20]; Ex. B [Tr. 14:17-16]:14; Ex. R at 12.

[112] *MacKinney v. Nielsen*, 69 F.3d 1002, 1007 (9th Cir. 1995) (quoting *Duran v. City of Douglas*, 904 F.2d 1372, 1377 (9th Cir. 1990)).

[113] *MacKinney*, at 1002. The question presented to this court is not whether arguable probable cause existed to arrest Bartlett based

2. A jury must decide whether Weigh and Nieves acted reasonably in arresting Bartlett for disorderly conduct.

The State argues Weight and Nieves had probable and arguable probable cause to arrest Bartlett for disorderly conduct because Bartlett either made an "unreasonably loud noise" or "recklessly create[d] a hazardous condition for others by an act which has no legal justification or excuse."[114] But Bartlett's "act" was to approach Weight to within earshot and express his opinion that Weight had no right to question Walker absent parental authorization. Alaska's disorderly conduct statute was not meant to penalize speech: "'Noise' does not include speech that is constitutionally protected."[115] And reasonable jurors could find that

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on the clearly established law of Hawaii, *see* Doc. 47 at 24 & n.15 (citing *Locricchio v. Richards*, 94 F.3d 652 (9th Cir. 1996) (unpublished opinion)), or California, *see* Doc. 47 at 25 & n.119 (citing *Kalb v. City of Oceanside*, 2013 WL 1316674, at *7 (S.D. Cal. Mar. 29, 2013)), or Arizona, *see* Doc. 47 at 25 & n.120 (citing *Portillo v. Montoya*, 170 Fed. Appx. 453 (9th Cir. 2006) (unpublished opinion)): The question is whether Alaskan troopers Weight and Nieves had arguable probable cause to arrest Bartlett at Arctic Man under the clearly established laws of *Alaska*.

[114] AS 11.61.110(a)(1), (6).

[115] AS 11.61.110(b). Whether noise is punishable as "unreasonably loud" depends on "the nature and purpose of the defendant's conduct and the circumstances known to the defendant, including the nature of the location." *Id.* Given the blaring party music, no reasonable officer could conclude that Bartlett's conduct was "a gross deviation from the standard of conduct that a reasonable person would follow in the same situation." *Id.*

Bartlett did not "recklessly create a hazardous condition" through his speech or conduct.

a. Bartlett's speech cannot be classified as disorderly conduct.

A reasonable jury could find that no reasonable police officer would have arrested Bartlett on a disorderly conduct charge simply for vocalizing an opinion. "A policeman's special powers and training, and his constant exposure to situations where the norms of common speech are not distinguished by unvarying delicacy of expression, leave him less free to react as quickly as the private citizen to a purely verbal assault."[116] "Speech is often provocative and challenging. [But the freedom of speech] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[117] "[T]he substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[118]

Crawford v. Kemp demonstrates the limitations of Alaska's disorderly conduct statute when it is used to

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[116] *Anniskette v. State*, 489 P.2d 1012, 1015 (Alaska 1971) (quoting *Williams v. District of Columbia*, 419 F.2d 638, 646 n.23 (D.C. Cir. 1969)).

[117] *Anniskette*, at 1015 (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)).

[118] *Id.* (quoting *Bridges v. California*, 314 U.S. 252, 263 (1941)).

penalize speech.[119] In that case trooper Kemp entered the Fairbanks courthouse looking for a suspect, saw Crawford, and asked him his name. Crawford replied that he did not want to give his name and asked if he was being arrested. As Kemp walked away, he read Crawford's name off a form Crawford had been filling out, and Crawford loudly proclaimed that Kemp should feel proud for being able to read over someone's shoulder.[120] The situation escalated as Kemp came close to Crawford and told him he would be arrested if he continued to speak in a disorderly manner; Crawford then asked Kemp to stop flicking spittle into his face, and Crawford was arrested under AS 11.61.110(a)(1) and (6), the same subsections of Alaska's disorderly conduct statute at issue in this case.[121] Crawford brought a number of claims against Kemp under § 1983, and the superior court granted Kemp summary judgment, holding that probable cause existed for Crawford's arrest and that Kemp was immune from suit, but on appeal these decisions were overturned.[122]

Alaska's Supreme Court reasoned that "the objective reasonableness of Kemp's decision to arrest in this case presents a question of fact that requires

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[119] 139 P.3d 1249 (Alaska 2006).

[120] *Crawford*, at 1251.

[121] *Id.* at 1252.

[122] *Id.* at 1252-53, 1259.

resolution by a jury."[123] Factors buttressing this conclusion included the inference that Crawford's actions "could be viewed as constitutionally protected verbal opposition to what he perceived as over-reaching by a police officer," and the inference that Kemp made the arrest in part because he was "annoyed" with Crawford.[124]

Here, too, the issue of whether Weight and Nieves had probable or arguable probable cause to arrest Bartlett for speaking his mind to Weight should be determined by a jury. Like Crawford, Bartlett did nothing more than verbally oppose police conduct by refusing to speak with Nieves and then later questioning Weight's authority. Nieves was clearly annoyed with Bartlett and believed he could have arrested Bartlett for refusing to speak with him earlier.[125] Bartlett recalls that shortly after his arrest, Nieves told him "bet you wish you would have talked to me now" and then added "you're done."[126] And after Bartlett's arrest, as the troopers were commending themselves on how "restrained" they had been in

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[123] *Id.* at 1256.

[124] *Id.* at 1256-58; *see also Bachner Co., Inc. v. Weed*, 315 P.3d 1184, 1190 (Alaska 2013) ("Qualified immunity 'protect[s] the honest officer who tries to do his duty,' but it does not protect 'malicious, corrupt, and otherwise outrageous conduct.'" (quoting Weed v. Bachner Co. Inc., 230 P.3d 697, 700 (Alaska 2010)).

[125] Ex. D [Tr. 65:6-17].

[126] Ex. C [Tr. 99:19-100:4].

taking down Bartlett, Nieves told Weight about his earlier encounter with Bartlett.[127]

Nieves' animus toward Bartlett can also be inferred from his police report description of his first encounter with Bartlett, whom he portrays as yelling to the partygoers not to speak with Nieves even though no one at the party recalls Bartlett doing any such thing.[128] "From the fact that [Nieves] was irritated with [Bartlett] does not flow the inevitable conclusion that [Bartlett was engaging in disorderly conduct]. Nor does it follow that a reasonable officer in [Nieves'] position would similarly be provoked to make an arrest."[129] Whether Weight and Nieves arrested Bartlett in retaliation for his speech rather than for an actual violation of Alaska the law is a question of fact that should be resolved by a jury, which could find that no reasonable Alaskan officer would have arrested Bartlett for disorderly conduct simply because of his speech.

b. Bartlett's conduct did not create a hazardous condition.

The State does not assert that Bartlett's speech created a hazardous condition to other partygoers; rather, it asserts that Bartlett's speech unnerved

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[127] Ex. K [Tr. 76:1-11].

[128] *See* discussion, *supra* Section II.A. The retaliatory animus of both troopers can be inferred from the numerous demonstrably false statements in the police report and complaint as discussed above in Section II.

[129] *Crawford*, 139 P.3d at 1257.

Weight and Nieves, police officers who should have known better than to shove and tackle someone to the ground in reaction to mere words. As the law of Alaska has long recognized, "Insofar as the theory of disorderly conduct rests on the tendency of the actor's behavior to provoke violence in others, one must suppose that policemen, employed and trained to maintain order, would be least likely to be provoked to disorderly responses."[130]

Bartlett was arrested for "recklessly creat[ing] a hazardous condition for others by an act which has no legal justification or excuse."[131] A hazardous condition is "a condition posing a risk to the health or physical safety of others."[132] Under Alaska law, one acts recklessly if he "is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur."[133] The "result" at issue here is the subjective perception of Weight and Nieves that Bartlett posed a threat. "[T]he risk [that the result will occur] must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of

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[130] *Anniskette v. State*, 489 P.2d 1012, 1015 n.5 (Alaska 1971) (quoting Model Penal Code § 250.1, cmt. pg. 14 (Tent. Draft No. 13, 1961)).

[131] AS 11.61.110(a)(6); Doc. 7-2, at 2.

[132] *Wolfe v. State*, 24 P.3d 1252, 1258 (Alaska App. 2001); *see also id.* at 1256 n.9 (noting that a "hazardous condition" "would include shouting 'fire' in a crowded auditorium" (quoting 1978 Senate Journal, Supp. No. 47 (June 12), pg. 96)).

[133] AS 11.81.900(a)(3).

conduct that a reasonable person would observe in the situation."[134]

Weight and Nieves cannot avail themselves of qualified immunity simply by asserting that they perceived Bartlett as a threat.[135] Whether Weight and Nieves' had probable or arguable probable cause to arrest Bartlett for creating a hazardous condition depends on the resolution of many factual disputes. Construing the facts in Bartlett's favor, reasonable jurors could find that Bartlett was not highly intoxicated when he approached Weight; that Bartlett came close to Weight only to be heard over the blaring music; that Bartlett expressed his opinion to Weight; and that Bartlett never raised his hand in a threatening manner to Weight.

Reasonable jurors could also find that it was unreasonable for Weight and Nieves, trained police officers, to fear Bartlett under the totality of the circumstances, or that Weight and Nieves feigned fear after the fact to justify their provocative conduct toward Bartlett. Reasonable jurors could also justifiably infer that when two troopers band together they should feel safer and more in control of the situation. The inference could also be made that the sudden arrival of Nieves and the rolling video camera caused both troopers to put on a show to look tough and

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[134] AS 11.81.900(a)(3).

[135] Doc. 47 at 6 ("Sgt. Nieves believed that Trooper Weight perceived Bartlett to be a threat."). The State's argument abounds with such beliefs and perceptions. *E.g.*, Doc. 47 at 14, 16, 18, 26, 33, 35.

impress the partygoers and the eventual video audience.[136] Police officers' mere subjective declarations that they forcefully arrested an individual because that individual put them in fear are insufficient to establish qualified immunity and cannot remove questions bearing on the reasonableness of the officers' fear from the province of the jury.[137]

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[136] *See* Ex. F at 10 (explaining that police are more likely to "punish" suspects who challenge their authority to "conclusively demonstrate '*who's in-charge*'" (emphasis in original)).

[137] *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985) ("Whether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time,' and not on the officer's actual state of mind at the time the challenged action was taken." (quoting *Scott v. United States*, 436 U.S. 128, 136 (1978)); *Young v. County of Los Angeles*, 655 F.3d 1156, 1163-64 (9th Cir. 2011) (holding officer's subjective belief that individual was "trying to gain a position of advantage over me" and "was going to throw broccoli at me as a distraction before assaulting me" did not entitle officer to qualified immunity on excessive force claim because credibility of officer's fear "present[ed] a genuine issue of material fact that must be resolved not by a court ruling on a motion for summary judgment but by a jury in its capacity as the trier of fact."); *Price v. Sery*, 513 F.3d 962 (9th Cir. 2008) ("[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard for their underlying intent or motivation." (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)); *Deorle v Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001) ("[A] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern."); *see also J.H. v. Bernalillo County*, 61 F.Supp.3d 1085, 1159 (D.N.M. 2014) ("The subjective belief of an individual officer as to whether there was probable cause for making an arrest is not dispositive." (quoting *United States v. Valenzuela*, 365 F.3d 892, 896-97 (10th Cir. 2004)).

3. A reasonable Alaskan police officer would not have arrested Bartlett for harassment or assault.

The state argues that although it did not charge Bartlett with harassment or assault, Weight and Nieves had probable cause to arrest Bartlett for these crimes. "A person commits the crime of harassment . . . if, with intent to harass or annoy another person, that person (1) insults, taunts, or challenges another person in a manner *likely to provoke an immediate violent response*."[138] Reasonable jurors could conclude that no probable or arguable probable cause existed to arrest Bartlett under this statute for two reasons. First, Bartlett's intent in talking to Weight is disputed: Bartlett contends that he was merely advising Weight of his opinion that Weight could not question Walker absent parental authorization, whereas Weight contends that Bartlett spoke and acted in a threatening manner. The resolution of this factual dispute is for the jury and not this court, which must construe the facts in the light most favorable to Bartlett. Second, Weight and Nieves should not be allowed to manufacture probable cause using Alaska's harassment statute simply because both men did in fact respond to Bartlett's speech with an "immediate" and "violent" assault. As discussed above, police officers more so than ordinary citizens should be able to react calmly to verbal taunts. Just because Weight and Nieves responded violently to Bartlett's speech does not mean that reasonable Alaskan police officers confronting the same situation would have so acted.

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[138] AS 11.61.120(a)(1) (emphasis added).

The claim of Weight and Nieves that probable or arguable probable cause existed to arrest Bartlett for "recklessly plac[ing them] in fear of imminent physical injury" must also fail.[139] Those present on the scene testified that Bartlett did not seem hostile.[140] Moreover, as discussed above, the mere assertions of Weight and Nieves that they subjectively feared Bartlett because they thought he might assault them[141] are insufficient to entitle them to qualified immunity because the objective reasonableness of their fear presents a factual issue to be resolved by a jury.

4. No reasonable Alaskan police officer would have advocated for a resisting arrest charge against Bartlett.

As Bartlett has argued already, Nieves and Weight created a demonstrably false police report to justify the resisting arrest charge against him.[142] Krack, who witnessed the entire altercation, testified that Bartlett did not attempt to head-butt or throw punches at Weight or Nieves; Krack also testified he was in "shock" over how unexpected and quick the altercation was.[143] Walker's deposition testimony corroborates Krack's, and Walker also testified that the altercation caused his pulse to quicken and that he started

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[139] AS 11.41.230(a)(3).

[140] Ex. B [Tr. 23:4-7]; Ex. A [Tr. 50:21-53:12]; *see also* Ex. L.

[141] Doc. 47-8 at 3; Doc. 44-2 at 3-4.

[142] Doc. 49 at 2-4.

[143] Ex. A [Tr. 55:1-16].

"shaking" because Bartlett's arrest had scared him.[144] According to Walker, Weight shoved Bartlett because Bartlett had questioned Weight's authority.[145]

The undisputed video does not show Bartlett head-butting anyone, charging at anyone, or throwing any punches, nor does the State now argue that Bartlett took any of these aggressive actions detailed by Nieves and Weight in their police report.[146] The State also notes that one federal court has found that "natural reactions to a push or shove may constitute resistance," but this is immaterial – an analysis of probable cause in the context of a § 1983 false arrest claim hinges upon the state law forming the basis for the arrest, not upon federal excessive force common law.[147]

The crime of resisting arrest has three elements: that "police were arresting the [defendant], that [the defendant] knew the officers were arresting him, and that [the defendant] used force with the intent to

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[144] Ex. B [Tr. 28:15-18].

[145] Ex. B [Tr. 26:18-25]; *see also* Ex. F at 10-11.

[146] Doc. 47 at 21 ("Bartlett . . . pulled his arms away from the troopers, swung his arms across his body, and brought his head near theirs.").

[147] Doc. 47 at 21 & n.100. In *Crumley v. City of St. Paul* the Eighth Circuit, analyzing a § 1983 *excessive force* claim, noted that a natural reaction to an officer's push is a form of resistance, which "may justify the use of greater force." 324 F.3d 1003, 1008 (8th Cir. 2003). The *Crumley* court did not reach the merits of the false arrest claim because it determined plaintiff was collaterally estopped from re-litigating probable cause. *Id.* at 1006-07.

prevent the officers from making the arrest."[148] An arrest is "the taking of a person into custody in order that the person may be held to answer for the commission of a crime."[149] Here, no reasonable Alaskan trooper would have concluded that Bartlett knew he was being arrested as opposed to being stopped or detained or unlawfully assaulted.[150] Once Bartlett had been handcuffed, he was told he was "going to jail for harassing my troopers," a crime Bartlett was never charged with.[151] Bartlett was never informed in so many words that he was under arrest.[152] And Bartlett testified that when Nieves grabbed his arm, he "was startled and did not know who was grabbing me."[153] Once Bartlett identified his assailant as a Trooper, he began to comply with orders, but "did not know what was going on."[154] As Bartlett testified, he did not go immediately to the ground because he was

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[148] *Jones v. State*, 11 P.3d 998, 1001 (Alaska App. 2000) (construing AS 11.58.700(a)(1)).

[149] AS 12.25.160.

[150] *See State v. Miller*, 207 P.3d 541, 544 (Alaska 2009) (stating that a trooper may conduct an investigative stop when he has "a reasonable suspicion that imminent public danger exists or serious harm to persons or property has recently occurred." (quoting *Coleman v. State*, 553 P.2d 40, 46 (Alaska 1976)).

[151] Video at 02:24-02:34.

[152] *See* discussion, *supra*, at Section II.D.

[153] Ex. C [Tr. 79:3-9].

[154] Ex. C [Tr. 79:18-80:11].

> still in shock. I didn't know what . . . was going on and I'm . . . trying to process that, so it . . . takes a few seconds to process a command like that. When someone is yelling at you, you're in a state of shock and you don't know what's going on. I was . . . confused. So then I . . . finally, after I had time to process what they were saying to me, because this happened so quick and forceful, then I . . . slid out, like I just explained to you, onto my . . . chest and down to the ground.[155]

No reasonable Alaskan trooper in the same situation would have believed that Bartlett knew he was under arrest. Nor would a reasonable trooper have believed Bartlett's actions amounted to resisting arrest.

"Mere non-submission to an arrest" that does not "actively create a danger of physical injury" to the arresting officer does not constitute resisting arrest under AS 11.56.700(a)(1).[156] *Bultron v. State of Alaska* illustrates this principle.[157] In that case Bultron "held his hands rigidly in front of him so that the officers could not cuff his wrists back"; the officers then took Bultron to the ground, but he hid one of his arms underneath his body, and it took "*several minutes*"

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[155] Ex. C [Tr. 95:6-18].

[156] *Eide v. State*, 168 P.3d 499, 502 (Alaska App. 2007) (quoting Commentary on the Alaska Revised Criminal Code, 2 Senate Journal Supp. No. 47 at 85 (June 12, 1978)).

[157] Nos. A-10477, 10478, 2011 WL 5627897 (Alaska App. Nov. 16, 2011).

before the officers were finally able to cuff him.[158] In spite of these actions, Bultron's resisting arrest conviction was overturned on appeal.

The Alaska Court of Appeals held that the resisting arrest statute was intended "*to confine the offense to forcible resistance that involves some substantial danger to the person*. Mere non-submission ought not to be an offense. One who runs away from an arresting officer or who makes an effort to shake off the officer's detaining arm might be said to obstruct the officer physically, but this type of invasion or minor scuffling is not unusual in an arrest," and ought not to be penalized as resisting arrest.[159] The *Bultron* court further distinguished "an attempt to obstruct the trooper's efforts to complete the arrest" from "a use of force *directed at the trooper*," holding that only the latter constituted resisting arrest, while the former was "mere non-submission" to an arrest.[160]

The case relied on by the State, *Velarde v. State of Alaska*, is not on point.[161] In that case Velarde disobeyed a trooper's command by driving away, and when he eventually pulled over at a gas station, he

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[158] *Bultron*, at *2-3 (emphasis added).

[159] *Bultron*, at *3 (quoting *Howard v. State*, 101 P.3d 1054, 1058-59 (Alaska App. 2004) (emphasis in original) (noting that Alaska's resisting arrest statute is similar to Hawaii's and quoting Commentary on Haw.Rev.Stat. § 710-1026)).

[160] *Bultron*, at *4 (emphasis in original) (citing *Fallon v. State*, 221 P.3d 1016, 1021 (Alaska App. 2010)).

[161] 353 P.3d 355 (Alaska App. 2015); Doc. 47 & n.99.

locked himself into the bathroom.[162] Once troopers opened the door, it took two of them "to force Velarde's hands around his back to handcuff him," and even after being cuffed, Velarde pushed his body back against a trooper, who took him to the ground with a leg sweep, but Velarde then "began kicking and trying to get back up." It was not until a third trooper arrived on the scene and employed a "leg lock" that Velarde was finally subdued.[163]

As the video shows, Bartlett – in contrast to Velarde – did not kick at Weight or Nieves or attempt to get back up once knocked to the ground. And unlike Bultron – whose arrest lasted several minutes but whose conduct did not rise to the level of resisting arrest – Bartlett, once commanded to get to the ground, complied within a matter of mere seconds, 12 at the most.[164] Nor did Bartlett attempt to hide his hands from Weight or Nieves; rather, he quickly and voluntarily put his hands behind his back to be cuffed. A reasonable jury, comparing the video of Bartlett's arrest to the false police report, could easily find that no reasonable Alaskan officer in the same situation would have concluded probable cause existed to charge Bartlett with resisting arrest.

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[162] *Velarde*, at 356.

[163] *Id.* at 359.

[164] Video at 02:10-02:12. Bartlett testified that he went to the ground somewhat slowly to avoid reinjuring his bad back. Ex. C [Tr. 80:13-17].

B. Weight and Nieves Impermissibly Retaliated against Bartlett because of his Speech.

Weight and Nieves violated Bartlett's constitutional right to freely speak his mind,[165] and this right is clearly established under the law of both Alaska[166] and the Ninth Circuit.[167] Many well-established principles of law governed the troopers' interaction with Bartlett. "Probable cause is obviously lacking when the arrest is motivated purely by a desire to retaliate against" a verbal challenge to an officer's authority.[168] "The

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[165] *See Houston v. Hill*, 482 U.S. 451, 461 (1987) ("[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."); *accord MacKinney v. Nielsen*, 69 F.3d 1002, 1007 (9th Cir. 1995) ("Even when crass and inarticulate, verbal challenges to the police are protected."); *Duran v. City of Douglas*, 904 F.2d 1372, 1377 (9th Cir. 1990) ("[C]riticism of the police is not a crime.").

[166] *Crawford v. Kemp*, 139 P.3d 1249, 1251, 1258 (Alaska 2006) (holding that "[t]he constitutional protection of verbal communications directed at police officers was well-established" in 2001); *see also Anniskette v. State*, 489 P.2d 1012, 1013-16 (Alaska 1971) (holding that defendant could not be prosecuted for telephoning a police officer and "berating him with loud and abusive language" because such speech was constitutionally protected).

[167] *Velazquez v. City of Long Beach*, 793 F.3d 1010 (9th Cir. 2015) ("Ninth Circuit law . . . clearly establishes the right verbally to challenge the police." (quoting *MacKinney*, 69 F.3d at 1007)).

[168] *Gasho v. United States*, 39 F.3d 1420, 1438 (9th Cir. 1994); *see also Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990) ("[P]olice officers . . . may not exercise their authority for personal

freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."[169] And an officer's personal offense to crude words does not criminalize those words, for to do so "would be to make . . . the [protection] of the First Amendment shift with the mentation and emotional status of the . . . listener."[170] In *Duran v. City of Douglas*, for example, the Ninth Circuit reversed a grant of summary judgment on an officer's qualified immunity claim because the officer had unreasonably pursued, arrested, and injured an individual whose only offense was drunkenly cursing and making obscene gestures to the officer from the passenger seat of his wife's car.[171]

It is undisputed that the first contact between Bartlett and Nieves occurred slightly earlier at the Sadler party when Nieves approached Bartlett, tapped him on the shoulder, and asked to speak to him.[172] When Bartlett responded "What for?" Nieves' demeanor

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motives, particularly in response to real or perceived slights to their dignity.").

[169] *Houston v. Hill*, 482 U.S. 451, 462-63 (1987).

[170] *Crawford v. Kemp*, 139 P.3d 1249, 1257 (Alaska 2006) (alterations omitted) (quoting *Annishette v. State*, 489 P.2d 1012, 1015 (Alaska 1971)); *see also id.* (noting that police "should exercise more restraint than the private citizen" to "words that provoke in the average listener an immediate violent response").

[171] 904 F.2d 1372, 1374-75, 1376-78 (9th Cir. 1990).

[172] Ex. C [Tr. 61:15-63:12]; Ex. D [Tr. 65:2-17].

became aggressive, and Bartlett then told him: "I don't want to talk to you."[173] According to Nieves, Bartlett decision's not to speak with him was not "reasonable," and therefore Nieves contemplated remaining with Bartlett to see if he "end[ed] up crossing that line and becoming disorderly," but Nieves ultimately walked away.[174] Under clearly established law, Bartlett was well within his rights not to speak to Nieves. "[W]hen an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business."[175] Recall that when deposed, Nieves denied making charging decisions based on whether an individual was cooperative or polite,[176] but Nieves is depicted in the Arctic Man video declining to ticket a man for driving a motorbike without headlights because that man had been "so polite" to Nieves.[177]

It is also undisputed that Bartlett came within earshot of Weight to opine that Weight could not question Walker without parental authorization.[178] As the two men talk, the high resolution video shows Nieves striding in and Weight's eyes registering Nieves'

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[173] Ex. C [Tr. 62:6-63:5].

[174] Ex. D [Tr. 65:13-17].

[175] *Liberal v. Estrada*, 632 F.3d 1064, 1078 (9th Cir. 2011) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000)).

[176] Ex. D [Tr. 20:25-21:16].

[177] Video at 0:45-0:54.

[178] Ex. K [Tr. 35:10-13]; Ex. C [Tr. 78:12-14].

approach.[179] Weight then forcefully shoves Bartlett, and Weight and Nieves wrestle Bartlett to the ground and threaten him with a taser in front of his friends and onlookers. According to Bartlett, after the melee Nieves told him: "[B]et you wish you would have talked to me now."[180]

Reasonable jurors could conclude that Nieves interpreted Bartlett's earlier refusal to speak with him as a challenge to his authority; that Nieves then rushed over to Bartlett in retaliatory anger; that Weight shoved Bartlett simply for speaking his mind; and that both men then assaulted Bartlett to vindicate what they perceived as a challenge to their authority, a taunt that they could not leave unpunished in front of several onlookers and a rolling video camera.[181] Reasonable jurors could conclude that Nieves and Weight reacted to Bartlett's speech with an unconstitutional and sophomoric display of machismo and that no reasonable Alaskan trooper would have done likewise.

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[179] Doc. 47-9 (enhanced video at 00:02-00:09).

[180] Ex. C [Tr. 99:8-25].

[181] *See* Ex. F at 10-11 ("defendant officers' response to plaintiff was more probably than not an example of what is known in the police vernacular as "*contempt of cop*" or "*having failed the attitude test.*" (emphasis in original)); Ex. M [Tr. 66:8-13] (use of force not justified if suspect is simply rude and intoxicated).

C. Suddenly Shoving and Tackling Bartlett without Warning amounts to Excessive Force

Excessive use of force claims are analyzed under the Fourth Amendment and require "a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake."[182] Factors that inform this analysis include: "the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of officers or others, and whether he [was] actively resisting arrest. . . ."[183] Of these, the most important is whether the individual posed a threat,[184] which is gauged by "the standard of objective reasonableness,"[185] i.e., would a reasonable officer have felt threatened under the totality of the circumstances.[186] "[A]n officer's failure to warn, when it is plausible to do so, weighs in favor of finding a constitutional violation."[187] An excessive force analysis

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[182] *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)).

[183] *Espinosa v. City of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010).

[184] *Young v. Cnty of Los Angeles*, 655 F.3d 1156, 1164 (9th Cir. 2011).

[185] *Deorle v Rutherford*, 272 F.3d 1272, 1279 (9th Cir. 2001).

[186] *Id.* at 1281 ("[A] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern.").

[187] *Mattos v. Agarano*, 661 F.3d 433, 451 (9th Cir. 2011).

also considers "the availability of less intrusive alternatives to the force employed."[188] The Ninth Circuit has also remarked that "there is no mistake of law which immunizes an officer for applying force to a suspect for 'smarting off.'"[189] The Alaska Department of Public Safety's policy on use of force by troopers states that "[w]hen practical, a verbal warning shall be given before using force, to communicate that force would be used if the officer's orders were not obeyed."[190]

Blankenhorn v. City of Orange dealt with facts similar to those presented here.[191] In that case two police officers knew that Blankenhorn had been banned from a certain mall when they spotted him there talking to a friend, accompanied by his friend's younger brother and another boy.[192] An officer approached Blankenhorn, did not explain himself, and then grabbed Blankenhorn's arm; when Blankenhorn tried to pull his arm free, the officer threatened to mace him.[193] The officer asked Blankenhorn to kneel so he

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[188] *Glenn v. Washington Cnty*, 673 F.3d 864, 872 (9th Cir. 2011); *Young*, 655 F.3d at 1166 (noting "a variety of less painful and potentially injurious measures that would have been both feasible and reasonable under the circumstances.").

[189] *Liberal v. Estrada*, 632 F.3d 1064, 1078 (9th Cir. 2011).

[190] Ex. O at 2; *see also id.* ("Officers . . . may not ever use force as punishment or in retaliation.").

[191] 485 F.3d 463 (9th Cir. 2007).

[192] *Blankenhorn*, at 468, 478.

[193] *Id.* at 478.

could arrest him, Blankenhorn refused, and he was immediately gang tackled by three officers – during the struggle the officers punched him, shoved his face into the pavement, and later put hobble restraints on his ankles.[194] On these facts, the Ninth Circuit reversed the grant of summary judgment to the officers on Blankenhorn's excessive force claim.[195]

A number of considerations influenced this outcome: the misdemeanor crime of trespass was not severe, and "Blankenhorn did not pose a serious threat to the officers' or others' safety."[196] Furthermore, the Ninth Circuit recognized that an individual "has the limited right to offer reasonable resistance to an arrest that is the product of an officer's personal frolic," a right triggered by "the officer's bad faith or provocative conduct."[197] If the officer's conduct is provocative and the individual uses reasonable force in resisting it, then a "constitutional violation [has] occurred."[198] As the *Blankenhorn* court explained:

> [T]he arresting officers gave no warning that they were going to arrest [Blankenhorn] before

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[194] *Id.*

[195] *Id.* at 477-81.

[196] *Id.* at 478.

[197] *Id.* at 479 (quoting *United States v. Span*, 970 F.2d 573, 580 (9th Cir. 1992)).

[198] *Id. See also Aranda v. City of Mcminnville*, 942 F.Supp.2d 1096, 1107 n.9 (D.Or. 2013) ("[A]n officer's provocative conduct may trigger a limited amount of reasonable resistance that cannot then be used to justify the application of greater force.").

> gang-tackling him and later applying hobble restraints. Indeed, as the video shows, [one officer] did not even attempt to handcuff Blankenhorn before he [and two others] – as if by predetermined signal – simultaneously took hold of and wrestled [Blankenhorn] to the ground. The lack of forewarning, the swiftness, and the violence with which the defendant officers threw themselves upon Blankenhorn could reasonably be considered "provocative," triggering Blankenhorn's limited right to reasonable resistance and thus making their later use of the hobble restraints unreasonable.[199]

Here, Bartlett was charged with the misdemeanor crime of disorderly conduct and resisting arrest. Bartlett perpetrated no act of violence before Weight shoved him,[200] and "a non-violent misdemeanor offense . . . will tend to justify force in far fewer circumstances than more serious offenses, such as violent felonies."[201] Viewing the facts in Bartlett's favor, Bartlett did not pose a threat to the safety of Weight, Nieves, or other onlookers,[202] and a reasonable jury could so conclude. This factor suggests that the use of force against Bartlett was excessive.

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[199] *Blankenhorn*, at 479-80.

[200] Ex. C [Tr. 78:6-80:17].

[201] *Young v. City of Los Angeles*, 655 F.3d 1156, 1165 (9th Cir. 2011) (citing *Bryan v. MacPherson*, 630 F.3d 805, 828-29 (9th Cir. 2010)).

[202] *See* discussion of facts *supra* Sections II.B-C.

To the extent that Bartlett did resist the assault from Weight and Nieves, a reasonable jury could find that their conduct was provocative because it came without warning,[203] and no attempt was made to handcuff Bartlett before taking him roughly to the ground. A jury could also conclude that Bartlett acted reasonably in reaction to the troopers' provocative conduct, thus rendering their violent reactions to his conduct excessive.

Less forceful means for deescalating the situation existed – such as attempting further communication with Bartlett, ordering him to leave, or taking a step back from him.[204] Troopers at Arctic Man have a policy of pairing up to ensure officer safety.[205] If anything, Weight should have felt safer once Nieves rushed to his side, not more fearful of Bartlett, but the enhanced video shows Weight shoving Bartlett after eying

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[203] Ex. B [Tr. 20:22-21:5] ("Right as soon as [the incident] happened, [Krack and I] were like, [Weight] didn't even give him a warning."); Ex. A [Tr. 53:15-16] ("[Weight] didn't give [Bartlett] time to respond to his get-back order."); *see also* Ex. O at 2 ("When practical, a verbal warning shall be given before using force, to communicate that force would be used if the officer's orders were not obeyed.").

[204] Ex. M [Tr. 63:17-24] (stepping back can avoid an escalation to use of force); Ex. O at 2-3 (listing "officer presence, verbal persuasions, directions, and commands" as compliance methods to use before force).

[205] Doc 47 at 3 & n.6; Ex. M [Tr. 60:13-18].

Nieves' arrival.[206] A reasonable jury could find that reasonable Alaskan officers in that situation would have attempted to communicate with Bartlett rather than shove him and concertedly take him to the ground.

In addition, whether Weight and Nieves handcuffed Bartlett too tightly, causing him injury, presents an issue of fact. Weight and Nieves have identical recollections of this issue: "I do not recall whether I assisted in handcuffing Mr. Bartlett. If I did, I would have used standard cuffing techniques."[207] Bartlett recalls that he was handcuffed, and that he later asked that the cuffs be loosened – the cuffs had cut off circulation to his hands, turning them purple.[208]

When viewed in Bartlett's favor, as the facts must be on summary judgment, a reasonable jury could find that Weight and Nieves used constitutionally unacceptable force under the circumstances.[209] The constitutional right not to be gang-tackled by police

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[206] Doc. 47-9 (enhanced video at 00:02-00:09); Ex. M [Tr. 63:10-15] (there is no explanation for why a trooper who had not yet used force would decide to once his partner arrives).

[207] *Compare* Doc. 47-8 at 6, *with* Doc. 44-2 at 4.

[208] Ex. C [Tr. 30:15-31:10]; *see also* Ex. A [Tr. 34:14-15] (Weight and Nieves cuffed Bartlett); Ex. B [Tr. 28:19-21] (same).

[209] *See Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) (en banc) (noting that the Ninth Circuit has "held on many occasions that summary judgment . . . in excessive force cases should be granted sparingly" because an excessive force inquiry "nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom").

officers without warning was clearly established at the time Bartlett was arrested,[210] and a reasonable jury could find that the conduct of Weight and Nieves was not objectively reasonable under the circumstances and that neither could have reasonably believed their shove and concerted takedown of Bartlett was lawful.

D. Weight and Nieves Maliciously Procured Bartlett's Prosecution.

To prevail on a § 1983 malicious prosecution claim, Bartlett must present facts a reasonable jury could credit showing that "the initial proceeding (1) terminated in his favor, (2) was brought without probable cause, and (3) was initiated with malice."[211] The proceeding must also have been brought "for the purpose of denying [Bartlett] equal protection or another specific constitutional right."[212]

A malicious prosecution claim cannot be founded on the Due Process Clause of the Fourteenth Amendment because that amendment does not guarantee a substantive right "to be free from criminal prosecution

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[210] *See generally Blankenhorn v. City of Orange*, 485 F.3d 463 (9th Cir. 2007).

[211] *Kollodge v. State*, 757 P.2d 1024, 1026 (Alaska 1988); *see also Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066 (9th Cir. 2004) (analyzing state law elements of malicious prosecution for purposes of § 1983 claim).

[212] *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995); *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985).

except upon probable cause."[213] But the Ninth Circuit has "not interpret[ed] *Albright* as establishing a rule that Fourth Amendment violations are the *only* proper grounds for malicious prosecution claims under § 1983,"[214] and accordingly such claims have been allowed to proceed on the theory that other constitutional rights were violated.[215]

Bartlett's malicious prosecution claim should be allowed to proceed based on two alternate theories. First, as Bartlett has already argued,[216] the Ninth Circuit has recognized a liberty interest under the Fourteenth Amendment to be free "from criminal charges premised on fabricated evidence," which is distinct from the liberty interest not to have proceedings brought in disregard to the defendant's guilt or innocence.[217]

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[213] *Albright v. Oliver*, 510 U.S. 266, 268 (1994) (plurality opinion suggesting that such claims be brought under the Fourth Amendment); *Id.* at 275-76 (Scalia, J., concurring); *Id.* at 276 (Ginsburg, J., concurring).

[214] *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1069 (9th Cir. 2004) (emphasis added); *cf. Birtton v. Maloney*, 196 F.3d 24, 28 (1st Cir. 1999) (refusing to resolve whether § 1983 malicious prosecution claims must be brought under the Fourth Amendment).

[215] *Awabdy*, 368 F.3d at 1069-70 (listing freedom of assembly, freedom of association, freedom of speech, the right to pursue an occupation, and equal protection (citing *Poppell v. City of San Diego*, 149 F.3d 951, 961 (9th Cir. 1998)).

[216] Doc. 49 at 4-7.

[217] *Mata-Gonzalez v. Monico*, 2013 WL 5476952, at *6-7 (D. Or. Sept. 27, 2013) (permitting § 1983 malicious prosecution claim to

Second, the Supreme Court has recognized that pretrial limitations on a defendant's liberty may amount to a seizure within the meaning of the Fourth Amendment.[218] This is so because a "defendant released pretrial . . . is scarcely at liberty; he remains apprehended, arrested in his movements, indeed 'seized' for trial, so long as he is bound to appear in court and answer the state's charges."[219] Because this court could determine as a matter of law that Bartlett's prosecution was brought in violation of his right to be free from unreasonable seizures or his right to be free from criminal charges based on false evidence, Bartlett malicious prosecution claim should survive summary judgment.

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proceed based on violation of this right) (citing *Devereaux v. Abbey*, 263 F.3d 1070, 1074-76 (9th Cir. 2001)).

[218] *Albright v. Oliver*, 510 U.S. 266, 278-80 (Ginsburg, J., concurring).

[219] *Albright*, 510 U.S. at 279; *id.* at 278 (stating defendant must "seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction," and "[p]ending prosecution" defendant may "suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense"); *see also* Doc. 47-16 (setting $500 bail, requiring court permission to leave state, requiring appearance in court, and prohibiting Bartlett from drinking alcohol and entering bars or liquor stores). Here, Bartlett expended in excess of $7,000 defending the charges against him. Ex. E.

1. Bartlett can rebut the presumption of prosecutorial independence.

Although a prosecutor's decision to initiate legal proceedings creates a presumption that the arresting officers were not the legal cause of the prosecution, this "presumption may be rebutted if [Bartlett] shows that the independence of the prosecutor's judgment has been comprised."[220] Bartlett may do this by presenting facts a reasonable jury could credit showing that the charging prosecutor either "was pressured by police or was given false information" or "relied on the police investigation and arrest when he filed the complaint instead of making an independent judgment on the existence of probable cause for the arrest."[221] The presumption of prosecutorial independence may also be rebutted if Weight and Nieves acted with "reckless disregard" for Bartlett's rights or they "engaged in wrongful or bad faith conduct that was actively instrumental in causing the initiation of legal proceedings."[222]

The Ninth Circuit has held that the presumption was rebutted when a prosecutor "based the decision to prosecute solely on the information contained in the officers' reports, but the plaintiffs highlighted striking

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[220] *Beck v. City of Upland*, 527 F.3d 853, 862 (9th Cir. 2008).

[221] *Id.* (citing and quoting *Smiddy v. Varney*, 665 F.2d 261, 266-67 (9th Cir. 1981)).

[222] *Id.* at 862-63 (quoting *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1067 (9th Cir. 2004)).

omissions in those reports as well as the fact that the officers themselves offered conflicting stories."[223]

Here, as Bartlett has already argued, Beard accepted the case for prosecution based solely on "the charging documents and submitted evidence."[224] From his reading of the criminal complaint, supporting affidavits, and police reports,[225] Beard believed that Nieves had told Bartlett he was under arrest – and Beard generally accepted the reports as true – but Beard later admitted the video did not show Bartlett being told he was under arrest, did not show Bartlett slurring his speech, and did not show Bartlett head-butting anyone.[226] Beard also later admitted the video did not show Bartlett "fighting" with either trooper.[227] Beard conducted no independent investigation before deciding to prosecute Bartlett but instead relied solely

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[223] *Newman v. Cnty of Orange*, 457 F.3d 991, 994 (9th Cir. 2006) (citing *Borunda v. Richmond*, 885 F.2d 1384, 1390 (9th Cir. 1998)); *see also id.* (noting that presumption is rebutted when "prosecutor relied solely on the arresting officers' reports, which omitted critical information," plaintiff's version of events is corroborated, and "officers' accounts conflicted" (citing *Barlow v. Ground*, 943 F.2d 1132, 1137 (9th Cir. 1991)).

[224] Doc. 49 at 6 (citing Doc. 44-10 at 3); *see also* Ex. S [Tr. 16:8-16; 49:21-55:10].

[225] Ex. S [Tr. 16:8-16].

[226] Ex. S [Tr. 59:5-15; 60:5-61:7; 133:9-134:8 (arrest); 33:17-24 (truth of reports) 103:1-104:11 (slurring his speech); 128:1-129:15 (head-butt)].

[227] Ex. S [Tr. 139:13-140:18].

on the misinformation submitted to him by Weight and Nieves.[228]

The reports on which Beard relied grossly mischaracterized the altercation with Bartlett, as both the video and the deposition testimony of Walker, Krack, Thain, Bartlett, and Sadler demonstrate.[229] When viewed in Bartlett's favor, as the facts must be on a motion for summary judgment, Bartlett did not shout at the RV occupants not to speak with Nieves; did not charge up to Weight and Walker or position himself in between Weight and Walker; did not come at Weight after being shoved or attempt to head-butt or punch either trooper; and Bartlett was not highly intoxicated.[230] Bartlett has presented "ample evidence from which a reasonable jury could conclude that the arresting officers, through false statements and material omissions in their reports, prevented the prosecutor from exercising independent judgment."[231]

2. Bartlett can satisfy the state law elements of malicious prosecution.

The first element of a malicious prosecution claim is that the proceeding terminated in favor of the

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[228] Ex. S [Tr. 173:12-176:12].

[229] *See* discussion, *supra* Section II.

[230] *See* discussion, *supra* Section II;

[231] *Barlow v. Ground*, 943 F.2d 1132, 1137 (9th Cir. 1991).

accused.[232] Here, the State alleges that the disorderly conduct and resisting arrest charges against Bartlett were dropped due to "budget issues" because it would have cost too much for ADA Beard to travel from one end of the Glenn highway to the other.[233] Bartlett posits another reason why the charges against him were dropped: once Beard saw the video, he emailed Nieves and exclaimed: "I don't like the editing of [the video]. I would like to get the original footage."[234] The inference that Beard dropped the case because the video did not corroborate the reports of Weight and Nieves is one that a reasonable jury could justifiably make.

Initiation of the proceeding with malice, the tort's third element,[235] can be inferred from the actions of Weight and Nieves.[236] In addition to the police report statements, which are flatly repudiated by the video,[237] Weight told Beard that he had asked Walker and Krack if they knew Bartlett, but that both had denied

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[232] *Kollodge v. State*, 757 P.2d 1024, 1026 (Alaska 1988). Bartlett has already argued that the second element, lack of probable cause, *id.*, has been met. *See* discussion *supra* at Section III.A.

[233] Doc.47 at 43 (citing Doc. 44-10)

[234] Ex. R at 11.

[235] *Kollodge*, 757 P.2d at 1026.

[236] *State Farm Mut. Auto. Ins. Co. v. Weiford*, 831 P.2d 1264, 1266 (Alaska 1992) ("Malice may be inferred if the acts exhibit 'a callous disregard for the rights of others.' (quoting *Alyeska Pipeline Serv. Co. v. O'Kelley*, 645 P.2d 767, 774 (Alaska 1982)).

[237] *See* discussion, *supra* at Section II.

knowing him.[238] Walker and Krack each deny that any such conversation with Weight occurred. A reasonable jury could draw the inference that Weight was attempting to portray Bartlett as a stranger with no rational reason for interjecting himself into a conversation between a juvenile and a trooper.

For his part Nieves noted in his police report that when he first encountered Bartlett, Bartlett was loudly telling people near the RV not to speak with Nieves, but everyone at the RV agrees that Bartlett did no such thing.[239] And Nieves, who was wearing a wireless microphone the whole time, responded that there was no audio of the arrest when questioned by his superior.[240] A reasonable jury could infer that Nieves deliberately withheld his knowledge of the video footage because it directly contradicted his version of the altercation. The inference could also be made that Weight and Nieves believed Bartlett had challenged their authority in front of onlookers and a rolling video camera, a challenge that unreasonably angered both men, causing them to behave provocatively toward Bartlett and then file a demonstrably false criminal complaint in further retaliation against Bartlett.[241]

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[238] *See* discussion, *supra* at Section II.G.

[239] *See* discussion, *supra* at Section II.A.

[240] *See* discussion, *supra* at Section II.F.

[241] After Bartlett's arrest, Nieves told Bartlett: "'[B]et you wish you would have talked to me now." Ex. C [Tr. 99:8-23].

3. Reasonable Alaskan officers know that it is unlawful to draft false police reports.

Assuming Bartlett has presented facts showing that Weight and Nieves violated his constitutional right to be free from criminal charges premised on false evidence, then Weight and Nieves would not be entitled to qualified immunity if "it would be clear to a reasonable officer that [their] conduct was unlawful in the situation [they] confronted."[242]

When deposed and asked whether he knew "that it was against the law to lie in an effort to convict somebody on charges they did not commit," Nieves replied, "We're just not supposed to lie about anything in this job. You get terminated for lying."[243] When deposed and asked how accurate he thought his police report was compared to the video, Weight admitted that the video did not corroborate his report but rather reflected his subjective perceptions and fears.[244] Nieves also testified that he did not worry whether audio of the event existed because "we had multiple Troopers present that all saw the same thing and all testified to it."[245] Nieves asserted "two troopers" were "more than enough" to "present[] everything that we needed to hold [Bartlett] accountable for his criminal activity that day" and that audio was not necessary because "we are set apart, we're set apart because we're known to be

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[242] *Garcia v. Cnty of Merced*, 639 F.3d 1206, 1208 (9th Cir. 2011).

[243] Ex. D [Tr. 23:9-24:4].

[244] Ex. K [Tr. 54:10-60:7].

[245] Ex. D [Tr. 44:24-25].

honest, we hold people accountable for criminal activity and that's what we do. . . . We have a solid reputation."[246] Viewed in Bartlett's favor, these facts could allow a reasonable jury to infer that a reasonable officer would have known it was unlawful to draft a false police report in order to charge someone with a crime.[247]

E. Punitive Damages are Appropriate.

"It is well established that a 'jury may award punitive damages under section 1983 either when a defendant's conduct was driven by evil motive or intent, or when it involved a reckless or callous indifference to the constitutional rights of others.'"[248] "[M]alicious, wanton, or oppressive acts or omissions are . . . all proper predicates for punitive damages under § 1983."[249] Bartlett has put forth evidence from

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[246] Ex. D [Tr. 41:12-46:13].

[247] *See Devereaux v. Abbey*, 263 F.3d 1070, 1074-76 (9th Cir. 2001).

[248] *Morgan v. Woessner*, 997 F.2d 1244 (9th Cir. 1992) (quoting *Davis v. Mason County*, 927 F.2d 1473, 1485 (9th Cir.1991)).

[249] *Dang v. Cross*, 422 F.3d 800, 807 (9th Cir. 2005) (citing *Smith v. Wade*, 461 US 30, 45 n.12, 46 n.13, 54 (1983)); *see also id.* at 810 ("Awarding punitive damages for oppressive conduct that was the cause of the plaintiff's injury deters and punishes the defendant for conduct that is not necessarily encompassed by malicious or reckless conduct. When a jury is instructed that it may award punitive damages for oppressive acts, the jury must consider the relative positions of power and authority between the parties and determine whether the defendant misused his power or authority or abused the plaintiff's weakness in the course of the wrongful conduct.").

which a reasonable jury could conclude that Weight and Nieves acted either maliciously, recklessly, or oppressively when they assaulted Bartlett based on his speech, falsely arrested him, and then fabricated false evidence to procure his prosecution. It would be premature at this juncture to hold as a matter of law that Bartlett is not entitled to any punitive damages: "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."[250]

F. Weight and Nieves Violated Bartlett's Right to Due Process.[251]

Although the Due Process clause of the Fourteenth Amendment does not impose upon police "an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution," due process is violated when police in bad faith fail to "preserve potentially useful evidence."[252] This duty applies to "cases in which the police themselves, by their conduct, indicate that the evidence could form a

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[250] *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2011) (quoting *Nelson v. City of Davis*, 571 F.3d 924, 927 (9th Cir.2009)).

[251] Bartlett does, however, agree with the State that he cannot assert a § 1985 conspiracy claim because he is not a member of a protected class. Doc 47 at 44-45; *Bretz v. Kelman*, 773 F.2d 1026 (9th Cir. 1985).

[252] *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

basis for exonerating the defendant."[253] Imposing this duty guards against situations where "potentially exculpatory evidence is permanently lost, [and] courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed."[254]

The Ninth Circuit has expanded the rule announced in *Youngblood* to situations where police in bad faith fail "to *gather* potentially exculpatory evidence."[255] In that habeas corpus case Miller challenged his assault charge, arguing in part that "he was denied due process because the investigating officer failed both to collect the victim's bloodstained jacket and to photograph [Miller's] scratched arms."[256] The Ninth Circuit observed that "failure to preserve evidence that is only potentially useful does not violate due process in the absence of bad faith on the part of the police."[257] But the court also concluded Miller had sufficiently established bad faith because the officer had referred to Miller "by using an extremely derogative expletive," the officer knew of the bloodstained jacket's existence

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[253] *Id.*

[254] *Id.* at 57-58 (quoting *California v. Trombetta*, 467 U.S. 479, 486 (1984)).

[255] *Miller v. Vasquez*, 868 F.2d 1116, 1120 (9th Cir. 1989) (emphasis added).

[256] *Id.* at 1117, 1119.

[257] *Id.*

yet "did not collect it," and the officer had attempted to dissuade witnesses from testifying at Miller's trial.[258]

"The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed."[259] The video in this case is extremely important because it originally included an hour of raw footage shot over the course of 4 to 5 hours by Thain, who stayed within 30 or 40 yards of Nieves during the night in question.[260] This hour of raw footage no longer exists, however, because after it was edited, it was erased within six months in accordance with the TV station's policy.[261] Had Nieves or Weight gathered a copy of the video, or even noted its existence in their police report, the raw footage could have been available for analysis.

From the facts Bartlett has presented,[262] reasonable jurors could find that Weight and Nieves failed to gather the video evidence because they knew it

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[258] *Id.* at 1120-21 ("Taken as a whole, these allegations and evidence raise a colorable bad faith claim."); *see generally Moldowan v. City of Warren*, 570 F.3d 698, 730-35 (6th Cir. 2009) (analyzing *Brady* claim in the context of § 1983 at length and ruling that such a claim, even if subject to the *Youngblood* bad faith requirement, survived summary judgment).

[259] *Youngblood*, 488 U.S. at 456 n.*.

[260] Ex. J [Tr. 26:9-27:17].

[261] Ex. J [Tr. 13:18-14:12].

[262] *See generally* discussion, *supra*, Section II.

contradicted their version of events, from which reasonable jurors could further infer that Weight and Nieves acted in bad faith. The video does not show Bartlett loudly telling the occupants of the RV not to speak with Nieves, which contradicts the police report. The video does not show Bartlett inserting himself between Weight and Walker, which contradicts Weight's affidavit in support of the criminal complaint. The video shows that Weight stepped forward to shove Bartlett, not that Bartlett came at Weight. The video, unlike the police reports and complaint, does not portray Bartlett fighting, throwing punches, head-butting, or being told he is under arrest. The video also captures Bartlett's clear and unimpeded speech, which contradicts both troopers' assertions that Bartlett was highly intoxicated. What is more, although Nieves was wearing a wireless mic and knew Thain had been filming him during the night in question, Nieves did not mention this film in either his use of force report or in his police report.

But Nieves admitted that as a police officer he is expected to "gather[] all the evidence that's available," including "observations and testimony of fellow . . . officers on scene [and] witness statements."[263] Nieves also understood that as a police officer he could request copies of videos shot by someone at the scene of a crime.[264] But when deposed Nieves also asserted that he could not have obtained a copy of the Thain video because it was "not my property" and he had no idea

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[263] Ex. D [Tr. 16:24-17:4; 17:23-18:11].

[264] Ex. D [Tr. 20:2-24].

whether Thain had been filming Bartlett's arrest.[265] In Nieves own words, securing a copy of the video from Thain was unnecessary because "I didn't need anything from [Thain] at the time because I already had testimony from my Troopers that were on scene and my observations of a crime that was committed."[266] But as Bartlett has demonstrated time and time again, the observations of Weight and Nieves concerning Bartlett's behavior on the night in question are patently false and do not hold up against the undisputed video evidence.

A police officer violates the Constitution when, in bad faith, he fails to collect potentially useful evidence. Reasonable jurors could infer that Nieves and Weight made no effort to obtain Thain's video because they knew it would directly refute their version of events, which amounts to bad faith. And reasonable jurors could also find that no reasonable Alaskan police officer would have failed to obtain a copy of evidence as essential and probative as Thain's video.[267]

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[265] *Compare* Ex. D [Tr. 38:17-41:20], *with* Ex. R at 11 ("The reporter in this case was also the camera man. He was standing next to or near me throughout my entire contact at this camp site.").

[266] Ex. D [Tr. 41:16-20]. Weight, although he recognized the video could be an important piece of evidence, similarly forgot to note its existence in his police report. Ex. K [Tr. 61:4-63:17].

[267] *See* Ex. Q [Tr. 42:1-46:17] (a competent Alaskan police officer would at least note in the police report the existence of a probative video taken at the scene of a crime).

IV. CONCLUSION

Weight and Nieves arrested Bartlett without probable cause, and a jury should resolve the reasonableness of their subjective perceptions and beliefs that Bartlett posed a threat. Weight and Nieves used concerted, unforewarned, and excessive force against Bartlett in retaliation for his mere verbal challenges to their authority when no reasonable Alaskan trooper would have done so. And although they knew it was unlawful, Weight and Nieves then drew up a false and embellished police report and criminal complaint to ensure Bartlett's prosecution. When "an otherwise competent officer . . . make[s] an unreasonable decision or make[s] an unreasonable mistake as to law or fact," that officer should face liability under § 1983.[268] Because a reasonable jury applying an objective standard could conclude that Weight and Nieves were "plainly incompetent" or "knowingly violate[d] the law,"[269] Bartlett respectfully submits that his § 1983 claims should survive summary judgment.

DATED this 15th day of March 2016.

/s/ Zane D. Wilson
714 Fourth Avenue, Suite 200
Fairbanks, Ak 99701
Phone: (907) 452-1855
Fax: (907) 452-8154

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[268] *Rosenbaum*, 663 F.3d 1071, 1078 (9th Cir. 2011) (citing *Liberal v. Estrada*, 632 F.3d 1064, 1078 (9th Cir. 2011)).

[269] *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Email: zane@alaskalaw.com
Attorney Bar #9111108

* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA AT FAIRBANKS

Case No. 4:15-cv-4 SLG

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
v.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Defendants.	)

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Q: Deposition of Michael Ingram

R: Correspondence between CSG, Inc. and State of Alaska

S: Deposition of Raymond Beard

DATED this 15th day of March 2016.

/s/ Zane D. Wilson
714 Fourth Avenue, Suite 200
Fairbanks, Ak 99701
Phone: (907) 452-1855
Fax: (907) 452-8154
Email: zane@alaskalaw.com
Attorney Bar #9111108

* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. 4:15-cv-00004-SLG

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
v.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Defendants.	)

DEPOSITION OF DAVID KRACK
July 27, 2015

APPEARANCES:

FOR THE PLAINTIFF:

ZANE WILSON
CSG, INC.
714 Fourth Avenue, Ste, 200
Fairbanks, Alaska 99701
(907) 452-1855

FOR THE DEFENDANTS:

STEPHANIE GALBRAITH MOORE
Department of Law

1031 West Fourth Avenue,
Suite 200
Anchorage, ALASKA 99501
(907) 269-5190

* * * *

* * *

[p.5]

couple weeks ago. I don't know if you remember that?

A Yes.

Q Have you spoken with Mr. Wilson on the phone?

A No.

Q In person?

A Like since then?

Q Yes.

A No.

Q No. Before that time, have you spoke with Mr. Wilson? That would be Mr. Bartlett's lawyer.

A No. Well, but I called once in October.

Q Okay. And what was that about?

A To see when Russell's court date was going to be.

Q Okay. And that would be the criminal court date?

A Yeah.

Q How did you meet Russell Bartlett?

A He's friends of some friends that I go snowmachining, four-wheeling, and camping with.

Q And who are those friends?

A Rob Carlson, Natalie Chamber – Chamberlain, Kyle Chamberlain. There's probably like 10, 12 of them.

Q So you have -- you -- would -- is it you and Mr. Bartlett kind of have mutual friends .....

A Yeah.

Q ..... that you met through?

* * *

[p.13]

Q Calm?

A Calm.

Q Do you recall whether he asked – did he ask either you or McCoy – did the trooper ask either you or McCoy whether you knew Russ Bartlett?

A No, I don't believe he did.

Q Okay. How did you know about the party that was going on at the Sadler place?

A You could hear it from anywhere on earth, man.

Q Because it was – it was like really loud?

A Yeah.

Q It was kind of the big party of the .....

A It was biggest one I've ever seen there.

Q Have you been to other Arctic Man?

A Six or seven, I think, so, yeah.

Q So in terms of biggest, what do you mean? The number of people, type of music, or .....

A The music and the way it was set up.

Q And how was it set up?

A They had a full DJ booth in the back of a trailer.

Q Did you drive by and see it going on or .....

A No.

Q ..... and you planned to go later or how .....

A You could hear it from where we were camping.

Q So you just said, let's go to the party?

* * *

[p.34]

Q Maybe his right? And so where -- how close did the -- his hand get to the trooper's face?

A A foot or so, maybe.

Q Maybe .....

A They were close, because you had to be close to talk to people. It was like really loud.

Q Sure. But could it have been closer than a foot, his ri -- his hand closer than a foot to the trooper's face?

A I don't think he was that close.

Q Okay. And then what happened when the trooper went to -- or what happened after Bart -- Mr. Bartlett was pushed away?

A He tried to stand up and two officers put him to the ground and handcuffed him.

Q Okay. So the -- and the trooper that was speaking with McCoy, that's the same trooper that came back and .....

A That I spoke to, yes.

Q Right, right. And that you described as calm?

A At that time, he was.

Q Yeah. And that -- I asked you this question, I think, when we spoke on the phone, so I'm going to ask you again. And I -- do you think that looking back on when Mr. Bartlett approached the trooper who was speaking with McCoy, that it's reasonable that a police officer

* * *

[p.50]

and answered.

A He was already over there.

Q He was already over there? So it's your inference then, is that Mr. Bartlett walked over there to speak with the trooper?

A Correct.

Q Okay. You don't have any idea why Mr. Bartlett walked where he walked?

A No clue.

Q It's entirely possible, based on what you saw, that Mr. Bartlett walked in this vicinity, and then the trooper came up to him. Is that correct?

A Possible.

Q You say that you're then having -- doing your party thing or whatever, and you notice, at some point, that McCoy Walker is in contact with the trooper, correct?

A Correct.

Q And then you say that you and Mr. Bartlett proceed to walk over there?

A Yes.

Q Is there anything about the way that you were walking that could make anybody perceive that you were some sort of a threat to folks?

MS. MOORE: Objection; form.

A No.

[p.51]

Q Was there anything about the way that Mr. Bartlett was walking that could be perceived as a threat?

MS. MOORE: Same objection.

A No.

Q Would there be any other description for describing how both you and Mr. Bartlett were walking, other than normal?

A Yeah, did normal pace.

Q Now, how long passed between the time that Mr. Bartlett gets to Trooper Weight and McCoy and the time that Trooper Weight shoves Mr. Bartlett?

A Had to have been less than a minute.

Q Less than a – could it have been a matter of seconds?

A Yeah. It was quick.

Q It was quick. Now, you said you heard Trooper Weight say something like, get back, and then he shoved Mr. Bartlett. Is that correct?

A Correct.

Q Were those two events pretty much simultaneous events or was there some spread between those events?

A There were – that was my one problem with this, is how quick he did it.

Q How troo – quick he did it, meaning Trooper Weight?

A Yeah, how quick the trooper pushed him.

Q So at the time that Trooper Weight pushes Russ

* * *

[p.53]

MS. MOORE: Objection; foundation.

A Yeah.

Q Did you observe Mr. Bartlett as he was speaking to the trooper?

A Yes.

Q And did you observe Mr. Bartlett's hands as he was speaking to the trooper?

A Yes.

Q Did Mr. Bartlett's hands do anything that trooper could have perceived as a threat to him with his hands?

MS. MOORE: Objection; foundation.

A Not that I saw.

Q At the time the trooper shoved Mr. Bartlett, did you perceive any reason for that action?

A No, because he -- he didn't give him time to respond to his get-back order.

Q Was Mr. Bartlett any closer to Trooper Weight than Trooper Weight was to Mr. [sic] McCoy?

A No.

Q Did Mr. Bartlett ever take any action to try to get in between Trooper Weight and Mr. [sic] McCoy?

A No.

Q Did Mr. Bartlett get any closer to Trooper Weight than anybody else was getting to people to talk to them there at the party?

[p.54]

A No.

Q After the trooper shoved Mr. Bartlett, did Mr. Bartlett try to come back at the trooper?

A He tried to stand up.

Q At any point, did you see Mr. Bartlett try to head butt one of the troopers?

A No.

Q Did you see Mr. Bartlett try to punch one of the troopers?

A No.

Q I mean, in your -- how far away are these events taking from you, Mr. Krack? I mean, how far away are you when they -- when these troopers jumped on Mr. Bartlett?

A 10 feet, maybe.

Q Anything impeding your vision?

A No.

Q Did you ever see Mister -- whether it was a punch or not, ever see Mr. Bartlett, quotes/unquote, swing his right fist towards one of the troopers?

A Not that I can recall. Maybe as he was falling, his arm fell back.

Q Did Mr. Bartlett's arm do any action, other than just trying to stop himself from face planting in the ground?

A No.

[p.55]

Q You say you were in shock regarding -- you were and Mr. [sic] McCoy were in shock regarding what had just happened. Do you remember making that statement?

A Yeah.

Q What were you in shock about?

A How quick it happened and we didn't really know what happened.

Q So you just observed it yourself and you're sitting there going, why did they do this?

A Yeah.

MS. MOORE: Objection; form of the question.

Q Is that an accurate statement?

A Yes.

Q And when you're going, why did they do this, who are you referring to there?

A The troopers.

Q Did you ever do it -- did you see Mr. Bartlett do anything that you would perceive as him trying to fight with the troopers?

A No.

Q Was there ever any point where Mr. Russ -- Mr. Bartlett's chest was, quotes, almost touching Trooper Weight's chest?

A He wasn't that close.

Q And you say you're -- describe for me, again, what

[p.56]

the -- your ability to recall these events. I mean, do you think you have a good recollection, a poor recollection? How would you .....

A It's fair. I mean, it has been a year-and-a-half since the incident happened.

Q How about at the time you were there, had you consumed so much alcohol that you believe it would impair your ability to recall these events?

A No.

Q Do you believe Mr. Bartlett was so intoxicated in some manner, it would impair his ability to recall the events?

MS. MOORE: Objection; foundation, form.

A No.

Q And immediately prior to this event with the trooper, you'd been interacting with Mr. Bartlett, correct?

A Yes.

Q Talking, walking?

A Yep.

Q Dancing?

A Correct.

Q As you talked to Mr. Bartlett, did you perceive that he was intoxicated in some manner?

A You could tell he'd been drinking, but he wasn't drunk.

Q Was he able to speak clearly?

[p.57]

A Yes.

Q Did he have slurred speech?

A No.

Q Was Mr. Bartlett stumbling around when he danced?

A At dancing?

Q Just – was he just – as far as you could tell, was he dancing just ordinary way he would otherwise dance?

A Yeah.

Q Okay. Did you ever observe Mr. Bartlett do anything that you felt was a refusal to comply with the commands that were being shouted to him by the troopers?

MS. MOORE: Objection; foundation, form.

A No.

Q Did you see this coming in any way?

MS. MOORE: Objection; form .....

A No.

MS. MOORE: ..... foundation.

Q How long did it take from the time the troopers jump on Mr. Bartlett and arrest him – handcuffed him, arrest him, how long did it take you to kind of digest what had just taken place?

A Probably about five, ten minutes or some – so, just .....

MR. WILSON: Go off the record just for a second.

COURT REPORTER: We're off record. Time is 4:10.

[p.58]

(Off record)

(On record)

COURT REPORTER: We're on record. Time is 4:11.

Q Did you observe Mr. Bartlett do anything that would you perceive as, quotes/unquotes, hostile towards the trooper?

MS. MOORE: Objection; form, foundation.

A No.

Q Did you observe Mr. Bartlett do anything that you perceived as, quotes, aggressive, unquotes, toward the trooper?

MS. MOORE: Same objection.

A The only thing I could see is him being that close, but .....

Q Which, within the context of the noise, was the normal engagement manner .....

MS. MOORE: Objection; form.

Q ..... is that correct?

A Correct.

MR. WILSON: That's all the questions I have Thank you, Mr. Krack.

DAVID KRACK

testified as follows on:

REDIRECT EXAMINATION

BY MS. MOORE:

* * *

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. 4:15-cv-00004-SLG

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
v.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Defendants.	)

DEPOSITION OF MACCOY WALKER
September 1, 2015

APPEARANCES:

FOR THE PLAINTIFF:

ZANE WILSON
CSG, INC.
714 Fourth Avenue, Ste, 200
Fairbanks, Alaska 99701
(907) 452-1855

FOR THE DEFENDANTS:

STEPHANIE GALBRAITH MOORE
Department of Law

1031 West Fourth Avenue,
Suite 200
Anchorage, ALASKA 99501
(907) 269-5190

* * * *

* * *

[p.5]

Q Okay. Mr. Walker, what's your occupation?

A I go to school.

Q Where do you go to school at?

A North Pole High School.

Q And what grade are you in?

A I'm in eleventh grade.

Q And what is your age?

A 17.

Q And do you know a gentleman by the name of Russell Bartlett?

A Yes, sir.

Q And how long have you known Mr. Bartlett?

A Well, now, for probably about three years.

Q And, I guess, how would you characterize your relationship with Mr. Bartlett? Is he a friend of yours, an acquaintance, what is he?

A Well, since that Arctic Man week, we became pretty -- pretty good friends.

Q Okay. And so how -- did you attend the 2014 Arctic Man?

A I did.

Q And how did you get there?

A I rode down there with my cousin, Ashley and David.

Q David Krack?

A Yep, David Krack.

* * *

[p.8]

that basically consumed the rest our day after riding snowmachine. We got back to our camp. They were having a little fire. We're all having a fire. Everybody went to bed besides for David, Russ, and I. And the lights over there at the party were just lighting up the entire place, so we decided to walk over there and that's when everything happened.

Q Okay. Let me back up before that point. You were -- before you went to the party, you were there at the campsite with Mr. Krack and with Mr. Bartlett, is that correct?

A Yeah.

Q Okay. Did you notice anything about them in terms of what they were up to before they went to the party? Had they been consuming any alcohol?

A Not that I recall. Not much, at least. I know David had a beer in his hand walking over there.

Q Okay.

A And Russ had a backpack with some alcohol in it.

Q Did you -- before you got to the party, I mean, was anybody, from your perspective, visibly intoxicated like .....

A Unh-huh.

Q Okay. Did anybody have slurred speech?

A No, sir.

[p.9]

Q Stumbling? Any difficulty controlling their percep .....

A No.

Q ..... their faculties?

A Unh-huh.

Q Okay. And so how did you get to the Sadler party, to your recollection?

A We walked.

Q Is it possible you rode in a trailer that somebody else was pulling around with folks in some kind of an RV?

A Yeah. I actually take that last one back. We rode over there. We got a ride over. We got dropped off there and we were hanging out, and then we walked back.

Q Okay. And who dropped you off, if you recall?

A Alan Crow.

Q Okay. And what did he drop you off in?

A It was a side-by-side pulling the snowmachine trailer.

Q And so who went to the party with you?

A David and Russ.

Q And do you have any recollection of about what time it was when you arrived at the party?

A No.

Q Okay. And don't feel obligated to -- you know, if you don't know something, that's fine. We just ask questions and if you don't know, then we just move on.

* * *

[p.11]

Q And what was he yelling?

A He was just -- I'm not sure about that. You just .....

Q Okay.

A ..... heard yelling and then it was like a swarm of troopers came over to the door, and then they just shut the door on everybody. Just, you know .....

Q Did the troopers ever go into the camper?

A No.

Q When the troopers were at the door and you see them talking or interacting with the folks there, do you know where Mr. Bartlett was?

A Not that I recall, no.

Q Okay. In the course of you -- whenever you're observing the trooper there at the door, did you hear Mr. Bartlett holler anything at anyone?

A No.

Q If Mr. Bartlett had been close enough to holler at the trooper, would you have been able to hear it?

MS. MOORE: Objection; foundation.

Q She makes objections; you just go ahead and answer, okay?

MS. MOORE: Form.

A Yeah, I could have heard it, because I could hear the troopers yelling. So if Rusty was going to yell, I'm sure I could hear it -- I could have heard it.

* * *

[p.14]

see any other interaction between the trooper and Mr. Bartlett prior to the time that Mr. Bartlett comes up to you and you're speaking with one of the troopers?

A No.

Q Okay. Were you, at least at times, hanging out with Mr. Bartlett at the party?

A Yeah. I know we got separated at a time that the RV incident happened with the other dude, and I was just standing next to David at that time. And then the trooper started talking to me pretty short after that.

Q Okay. How -- what's your best estimate of time between the RV -- what you observed at the RV at that time?

A Probably five or ten minutes.

Q Okay. So tell me what happened. You're standing in the crowd and what happened as far as this trooper goes?

A Well, me and David are standing there. We're kind of on the outskirts of the whole group of people around the DJ. And this really tall trooper -- I'm not sure which one it was; it was a taller guy -- come up to me and tapped me on my shoulder. And I turned around and he said, go ahead and come with me real quick. So, yes, sir, you know, whatever. Turned around and walked with him, and David was walking with me, because he was the guy I was there with.

[p.15]

He walked over and we got far enough back so we could actually talk. And the trooper said that he smelled alcohol on my breath. And I was like, no, sir, you know, I haven't even had a sip to drink today. Just got back from snowmachining and we were just -- you know, ate dinner and came over here. He was like, well, could you pass a Breathalyzer? I was like, yeah. And he was like,

okay. Well, I'm going to have to go back to my car real quick and get the Breathalyzer.

And so me and David were just standing there, and he walks back to his car. And it was quite awhile, probably five minutes at least, until the trooper came back to us. He got sidetracked or what not, helped out another trooper. And then he came over and he was actually -- when he got back, he was rude. He hooked up the straw, and then Russ came over and said, what's going on here? You know, and you don't have any right to do this with -- you don't have any off -- you don't have any -- you don't have the right to do this to him, officer. His parents aren't here. He -- you don't have permission to do it, you know.

And then Russ kind of did get up close, but it was at a party, and Russ is just a loud guy, so it might have sounded like he was yelling at the trooper, but really, I don't think he was. And the trooper shoved

[p.16]

him at his chest, just shoved him back, and Russ like stumbled back, and then he got up. He was like, what was that for? What was that for?

And then that's when the trooper tackled him. And I don't even know where the other troopers came out of, but they just started wrestling Russ right in front of us, and then ended up getting him -- his hands behind his back. And Russ is yelling, like, what did I do? What did I do? I want to talk to the sergeant. I want to talk to the sergeant. So they go and throw him in the back of the car and then

the cop comes back over to me and I pa -- I give the Breathalyzer. And he says, thanks; sorry you had to witness that. And then he just said, go ahead and get home now.

Q Okay. When the -- I'll go back through some of that. Let me take care of one of these things before I do that. Whenever they came back to you, did they ask you whether or not you knew Mr. Bartlett?

A No.

Q If -- had they -- had -- let's assume for a minute, that they had asked you whether you knew Mr. Bartlett, what would you have said?

A I would have said, yeah, because I did know him.

Q Okay. Let's go back -- let me show -- I want to show you a video. I mean, we'll work through some things

* * *

[p.19]

A Probably three feet, maybe, because me -- I was trying to communicate with the troop -- or, yeah, the -- with the trooper, and then he just kind of came up.

Q Okay. Can you describe Mr. Bartlett as he comes up? I mean, was he -- did he seem threatening to you in any way or .....

A No. He seemed curious, of course, because I was the guy that walked over there to the party with him with David and, you know, so I could understand where he was coming from, being curious and wondering what the heck the trooper was doing.

Q Okay. Did -- would you -- I mean, allegedly, Mr. Bartlett was angry. Did you see anything that indicated Mr. Bartlett was angry?

A No.

MS. MOORE: Object to the form of the question.

Q Okay. As Mr. Bartlett approached you, was there anything about your demeanor that you felt anyone could perceive as threatening?

A Well, Russ's?

Q Yeah.

A No.

Q Okay.

A Well, besides for his loud voice, but I -- that's not really threatening.

[p.20]

Q All right. As you're in the -- well, how long is this conversation that -- between Mr. Bartlett and the trooper before the trooper shoves Mr. Bartlett?

A It was really quick. The troo -- Russ asked if he has any right to do this without my parent or guardian or whatever. And that's when -- I don't remember Russ getting any closer than what he is right there. And that's when the trooper said that he was in his face, because he did say, you're in my face; get back, get back. And then shoved him.

Q And this is before you -- you say he said that before he shoved Mr. Bartlett?

A If I remember correctly, yes.

Q Okay. Let's play this here for a second. See -- can -- I mean, can -- do you think -- would it have been -- I mean, this is the first time the camera arrives. Do you know if that would have happened before or after this camera shot here?

MS. MOORE: Objection; form of the question, foundation.

A I don't -- I don't know.

Q Okay. Well, let's play it for you. Let me back up just a tid. See, we're at 2:04. I don't know where that's at here.

(Video played)

[p.21]

A Okay. So he said it right after he shoved him, basically. So he had no -- no time to process it, and that's what me and David were talking about. Right as soon as this happened, we were like, he didn't even give him a warning.

Q Okay. Now, did you see Mr. Bartlett do anything that your perception was, it prompted the trooper to shove him; I mean, that caused that to occur?

A No.

Q Was Mister -- I mean, looking at that picture there, was Mr. Bartlett any closer to the trooper than you were?

A No, not at all.

Q In fact, you were probably closer, is that .....

A I was probably closer, because the trooper is a tall guy. He had to like kind of crouch down to get face-to-face with me, you know.

Q And do you feel that your contact there, the little group of you, were you closer than you would otherwise be, but for the noise, or do you think the noise had any impact on how close everybody was at that point?

A Yeah, the noise .....

MS. MOORE: Form.

A The noise definitely affected how close we were, because we had to be close in order to hear. I mean,

[p.22]

the music was pretty loud, but we could definitely hear once we were in tight close like that. Even without Russ being there, me or David and the trooper and I, we were all still tight.

Q Okay. You've worked through -- do you remember any other conversation other -- before the shove, other than what you've already related to us?

A No.

Q Did Mr. Bartlett ever get -- come -- like -- you said that was the -- what we saw there, what two-some -- odd that was as close as Mr. Bartlett ever got?

A Yeah, that I remember.

Q Okay. Did Mr. Bartlett ever get as close what you would call like chest-to-chest; chest almost bumping the .....

A No, because he would .....

Q ..... trooper?

A ..... have had to move me out of the way.

Q Did you ever see, at any point in the conversation, where Mr. Bartlett had an angry look on his face?

A No.

Q Was there ever any point in the conversation where Mr. Bartlett tried to get between you and the trooper?

A No.

Q Did Mr. Bartlett ever try to put his arm or, you know,

[p.23]

go like this, and try to get in between you and the trooper?

A No.

Q Did Mr. Bartlett do anything that you would have perceived or you think anybody could have reasonably perceived as being hostile?

A No.

MS. MOORE: Objection; form.

A Not at all. Besides for -- when he was going to get taken down by the two troopers, he didn't just lay

like – he was really wondering what happened, and I could see how that might be, you know, that the troopers would have to put some force into it, but other than that, absolutely not.

Q As you remember seeing it, when the trooper went to shove Mr. Bartlett, did the trooper have to get closer to Mr. Bartlett to shove him?

A Yeah. I remem – I think he took a step and then shoved him.

Q Any point in this conversation between Mr. Bartlett and Trooper Weight where Mr. Bartlett was slurring his speech?

A No, not – really, not that I remember.

Q Did you see Mr. Bartlett do anything that you perceived as combative? And before the shove, okay? I'm talking

[p.24]

about before the shove, at this point.

A No, not until the trooper shoved him.

Q When the trooper shoved Mr. Bartlett, I gu – did you see that coming at all?

A Not at all. And I – I think that's why he got kind of – you know, was yelling and stuff, because it came out of nowhere, really. He didn't say, if you don't step back, I'm going to arrest you, or anything.

Q Was there ever any point in time where Mr. Bartlett – the trooper was trying to say something

and Mr. Bartlett is like talking over him and not letting him say anything?

A No, not that I remember.

Q In your ability to observe these events -- I mean, you're -- this group of you folks is well -- all within three feet of each other?

A Yeah.

Q Is that .....

A The .....

Q Was there anything that would have -- go ahead. I didn't mean to interrupt you.

A The trooper and I and David? Yeah.

Q And Mr. Bartlett, all three of you.

A Yeah. We were -- we were in pretty tight. But it -- I still had my personal space, you know, or else I would

* * *

[p.26]

Q When the shove happened, I guess, what was your immediate reaction? I mean, when this goes down in front of you, what were you thinking?

A I know when it happened, I was just like, what the heck? Never seen somebody get arrested right in front of me, and I -- I didn't even know what to say, really.

Q Did you think Mr. Bartlett had done anything that warranted this treatment?

A No, besides for maybe coming across scary because of his loud voice. That's it. That's all I could think of.

Q Was it any louder than anybody else that was trying to talk over the music?

A No, the troo .....

MS. MOORE: Objection; form.

A The trooper was just as loud as Russ it seemed like to me. We all kind of had to raise our voices.

Q As you look back on it, do you think – is there anything that Mr. Bartlett did that you feel escalated this to the point where the trooper shoved him?

MS. MOORE: Objection; form.

A Maybe say that you don't have any right, so maybe like doubting the trooper's power, maybe. I don't know.

Q So he questioned his authority?

A Yeah, yeah.

[p.27]

Q Okay. Now, I want to talk about from the point where Mr. Bartlett gets shoved, okay. We're going to move forward with that. In – as the troopers are grabbing hold of Mr. Bartlett, did you observe Mr.

Bartlett do anything that you could perceive as he tried to throw a punch at anybody?

A No. Besides, the troopers pulled his arms back like that. So if there's a trooper in front, maybe he would think that he raised his fist at him, but, no, he just got his arms pulled back and taken down.

Q So it was the troopers that pulled his arms .....

A Yeah.

Q ..... back?

A Yeah. He did not – only thing that he done wa -- he was trying to not eat the snowbank. You know, he was fighting that. That's it.

Q Did you observe Mr. Bartlett try to head butt either of the troopers?

A No.

Q Did -- you know, I'll -- let me represent to you that it says in the troopers' report here, they claim that Mr. Bartlett tried to head butt one of these troopers. Did you see anything that could, in any way, shape or form, be construed as an attempt by Mr. Bartlett to head butt one of the troopers?

[p.28]

A Absolutely not.

Q Did you see anything that you would describe as Mr. Bartlett tried to fight the troopers?

A No.

Q The time frame -- they jumped on Mr. Bartlett to the time he was in the snow. What's your recollection of it? I mean, you saw it on the video. What's your recollection of how long that took?

A It was fast, it seemed to me, standing right there. It happened kind of like -- but also, I -- I don't know, you know .....

Q Have you really digested even what had occurred .....

A No.

Q ..... before Mr. Bartlett was on the ground?

A My heart was already beating because we were at there, and then that happened, and I was just -- I didn't even know what to say. I started shaking, you know, because it was scary.

Q So let me work through after. So they get Mr. Bartlett on the ground; they handcuff him, right?

A Yeah.

Q I want to make sure I understand every thi -- every bit of conversation you heard after that. Work me through that again, if you would.

A The trooper -- or Russ said, I want to talk to your --

[p.29]

your boss or your sergeant or whatever. And I don't remember the troopers ever responding back. I do remember the trooper saying that he was going to get tased. And then they just picked him up and hauled him off. And I couldn't really hear him

yelling at the car, but I – you – I could, but I couldn't depict what he was saying.

Q Okay. And so then the trooper – Mr. Bartlett got arrested. He got taken back to the truck. And then you say the trooper then did come back and administer a breath test?

A Yes.

Q And how confident are you, Mr. Walker, that the trooper, at no time, asked you whether or not you knew Mr. Bartlett?

A He never asked me that.

Q And could you – I mean, the trooper claims that he asked you if you knew Mr. Bartlett and you told him that you did not know Mr. Bartlett.

A I would have never said that, because I knew him from – we've been – we were together for at least two days prior to this incident, you know, and we've met prior at a friend's house barbecue, so .....

Q Did you say anything that anybody could possibly construe as a statement you did not know Mr. Bartlett?

[p.30]

A No.

Q That's just a bald-face lie?

MS. MOORE: Objection; form of the question .....

A Yeah.

MS. MOORE: ..... foundation.

Q You said, yes?

A Yes.

MS. MOORE: Objection; same objection.

Q Now, at the time that the troopers arrested Mr. Bartlett, did you have any sense of whether or not a riot was getting ready to break out?

A No.

Q That -- there was no riot that you saw there?

A No.

MS. MOORE: Objection; form.

Q Did you see anything that you thought led you to believe that maybe a riot was about ready to happen?

MS. MOORE: Objection; form, foundation.

A No.

Q Okay. Did any of the troopers ever say anything to you about they thought there was a riot about ready to happen?

A There was -- no. I -- no.

Q Was there anything about the way Mr. Bartlett walked -- you say you saw him about, you know, three or four feet

* * *

Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. 4:15-cv-00004-SLG

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
v.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Defendants.	)

DEPOSITION OF RUSSELL BARTLETT
July 27, 2015

APPEARANCES:

FOR THE PLAINTIFF:

ZANE WILSON
CSG, INC.
714 Fourth Avenue, Ste, 200
Fairbanks, Alaska 99701
(907) 452-1855

FOR THE DEFENDANTS:

STEPHANIE GALBRAITH MOORE
Department of Law

1031 West Fourth Avenue,
Suite 200
Anchorage, ALASKA 99501
(907) 269-5190

* * * *

* * *

[p.30]

was working the jail that night. And I believe he works over here at the courthouse.

Q Over -- when you say over here .....

A At the courthouse.

Q The Fairbanks courthouse?

A Fairbanks courthouse.

Q Have you seen that person over there?

A I have not.

Q Then what makes you think he works at the Fairbanks courthouse?

A He had told me so.

Q When did he tell you that?

A During -- during my -- during my incarceration at the jail at the Arctic Man.

Q What else did you talk about with him?

A I asked him if he could release my -- or loosen my cuffs on my hands, because they were very tight.

Q And did he do that?

A He did. He brought them around from the back of -- behind my back where I was cuffed, and I brought them around to the front. And at that time, I -- I had told him and -- to take notice of how -- the color of my hands. They were purple, because the cuffs were so tight on my wrists and cutting into my wrists, that it cut off the circulation to my hands.

[p.31]

Q Had you told anyone before that, that your cuffs were tight?

A I did not. My hands started hurting -- hurting behind my back.

Q When did they first start hurting?

A I can't tell you exactly when.

Q Was that while you were in the tent?

A It was while -- while I was in the -- in the jail there at the tent. I started noticing my hands going numb and hurting.

Q And the -- and when you first told the trooper that was watching the tent, that they were -- how long did it take him to move them to the front?

A He did it immediately.

Q All right. Did you ask for any medical help at that time?

A I did not.

Q Did you ask for any medical help at any time when you were at the tent?

A I did not.

Q Did you believe you needed any medical help at the time?

A No, I did not. I didn't believe I needed any medical help.

Q So Arctic Man 2014, was that -- how long was the total

* * *

[p.61]

A Uh-huh.

Q And did you -- did your whole group go over to those people?

A The three of us, yes, went over to the people that he was speaking to, yes.

Q And di -- what ha -- what did you do next?

A I just stood there. I may have spoken with David Krack. I -- I don't recall. I don't recall.

Q Do you know the names of any of the people that McCoy knew?

A I do not.

Q And how long were you there?

A I want to say 10 minutes. I think it was 10 minutes.

Q What did you do next?

A I didn't do anything next. Actually, while I was standing there, is when Trooper Nieves came up and tapped me on the shoulder.

Q Before Trooper Nieves tapped you on the shoulder, had you seen any troopers at the party?

A No, just Trooper Nieves.

Q Did you see any troopers trying to -- running after any minors?

A No, I did not.

Q So Trooper Nieves was the first trooper that you saw?

A That I recall seeing, yes.

[p.62]

Q And the first time you recall seeing him is when -- was when he tapped you on the shoulder?

A That's correct.

Q And what did he say to you when he tapped you on the shoulder?

A He asked if he could talk to me.

Q And what did you say?

A I asked him, what for?

Q What did he say after that?

A His response -- well, he -- he kind of -- his demeanor changed. He was kind of just normal just asking that question, can I talk to you for a second. When I asked him the question, what for, his demeanor

changed. He -- he kind of, you know, wrinkled his face and -- and -- and -- and said, but you look like you're pretty interested in what was going on over there, kind of in that tone, in a -- in a more aggressive tone.

Q Did he say anything else?

A He did not.

Q And what .....

A Af -- right after that?

Q Well, what did you say when he said, you look like you were pretty interested?

A Well, I was kind of taken aback at first with his -- with his -- his tone. You know, I didn't know why

[p.63]

he -- why it had changed with asking him a simple, you know, question. And so I simply stated, you know what, I don't -- I don't -- I don't want to talk to you, because I didn't like the way that his demeanor was towards me.

Q And then what happened?

A Well, he just stood there looking at me, and I -- I -- I asked him, am -- am I free to go or -- or am I being detained?

Q And what did he say?

A I don't recall him saying anything. He just turned around and walked away.

Q Were there any troopers – other troopers in – nearby when Troop – when Sergeant Nieves was talking with you?

A No, he was the only one that I saw.

Q Did you see anyone filming or videotaping at that time?

A I thought I saw a camera at that time, but I wasn't sure.

Q Where was the camera?

A At – I believe it was over – what I recall, it was over by the – the motorhome.

Q And what was the ca – what was the – I don't know what you mean, you thought you saw a camera.

A I saw a camera and lights over by the motorhome with

* * *

[p.68]

Q Let me ask you this. Was there a – was there any alcohol outside the motorhome near the doorway?

A I don't recall. I don't recall.

Q Did anyone come .....

A I .....

Q ..... outside of the – out of the motorhome?

A No. I don't recall anybody coming out, no, from when I was looking over there in that direction.

Q It's possible someone came out; you just don't recall. Is that what you're saying?

A Yeah, it's possible someone came out. I -- I just don't recall.

Q Did you yell anything at Sergeant Nieves while he was at the door to the motorhome?

A No.

Q Did you yell anything at Sergeant Nieves at any time before he approached you?

A No.

Q Did you yell anything at the people in the motorhome while Sergeant Nieves was approaching the motorhome or near the motorhome?

A No.

Q Did you yell anything at any time that was something like, you don't have to allow troopers to search the motorhome?

[p.69]

A No, I don't recall saying anything like that.

Q Did you say anything at any time that you don't have to let him in?

A No.

Q So you've talked already about your conversation with Trooper Nieves. Is there anything else that you said to Trooper Nieves or he said to you near the motorhome that you -- we haven't discussed?

A I think, no. I think he -- I told you everything that he said that I recall.

Q And when he tapped you on the shoulder, where was the camera guy?

A I don't recall. I don't recall seeing him after that.

Q And where did Trooper Nieves go?

A After he tapped me on the shoulder and we exchanged -- or .....

Q Right.

A He walked off towards the back of the motorhome, in that direction.

Q All right. I pulled out a piece of paper I was going to use, and then I wrote on it.

MS. MOORE: Do you have a pen?

COURT REPORTER: I do. Do you want colors, magic markers, pencils?

MS. MOORE: A couple colors would be good.

* * *

[p.76]

there.

Q What were you wearing?

A I was wearing a Slednecks jacket, I believe, a backpack, kind of like a Sherpa hat, bunny boots, and black -- black thermals.

Q And what was David Krack wearing?

A He was wearing -- I believe he was wearing some kind of parka, and I don't know what else. I think a pair of bibs, snowmachine bibs.

Q What color was his parka?

A I don't recall.

Q What was McCoy wearing?

A McCoy was wearing, I believe, like a -- it was a -- I want to say Carhartt jacket. Oh, excuse me, I'd like to rephrase that. I was wearing a black Carhartt jacket. I don't know what I -- I can't remember -- what did I just say? Yeah, I was wearing a black Carhartt jacket, backpack, yeah, and a Sherpa type hat and it comes over the years with little dingle balls on it.

Q So what did you do next?

A Well, I was in the middle of the crowd there, and I had noticed that -- that -- I scanned and looked around and noticed that McCoy was not next to us anymore. So I scanned around and saw him at the edge of the crowd.

[p.77]

Q At the edge of the crowd .....

A Uh-huh.

Q ..... like -- can you put a -- like an X as to where -- the vicinity that you saw McCoy, like where he was?

A Yeah, I mean, it was somewhere over .....

Q Okay. So the X is like -- so where you saw McCoy?

A Roughly.

Q Got it.

A Yeah, I mean .....

Q And what was McCoy doing?

A I seen him conversing with Trooper Bryce Weight.

Q Okay. Could you hear what they -- what .....

A No, I could not hear anything that was being said.

Q Okay. So what did you do when you saw McCoy speaking with Trooper Weight?

A I tapped David Krack on the shoulder and got his attention, and pointed over to where McCoy was with Trooper Weight.

Q And then what?

A And then we walked over there.

Q You and .....

A David Krack.

Q ..... David. You walked over to Trooper Weight and McCoy?

A Yes, yes.

[p.78]

Q And do you stop? You just went straight to Trooper Weight and David -- or McCoy?

A Yes, we walked straight there.

Q And who was in front or did you walk side by side?

A I believe we were side by side.

Q And how would you describe your walk with -- in terms of speed?

A Normal.

Q Normal speed?

A Normal -- my normal walking speed, yeah.

Q And then what did you do?

A I -- I -- I walked up to Trooper Bryce Weight and made the statement that, you don't have the authority to talk to him without a parent or guardian present.

Q And then what?

A And then he simply looked at me and go -- and said, no, and hit me, both palms of his hand into my chest, knocking me back at least five feet, five, six feet.

Q And then what?

A And then -- and then when I was flying back, that's right when Sergeant Nieves was walking up to us. And then when I was flying back, he scoo -- grabbed my left arm and started yelling, get back, get back, get back .....

Q And then .....

[p.79]

A ..... while dragging me forward away from the RV this way -- away from the RV.

Q When Sergeant Nieves grabbed your arm, you recog -- did you recognize him?

A I did not.

Q Did you recognize him to be a trooper?

A I -- I -- I did after I turned and -- and looked at him and saw -- saw him. When he initially grabbed me, I -- I was startled and did not know who was grabbing me.

Q But you did turn toward him?

A I did towards -- turn him -- and saw that he was a state trooper.

Q And then what?

A I complied with his orders. He was yelling at me to get back, and I let him direct me wherever he was directing me to.

Q And then what happened?

A At that point, Trooper Bryce Weight walks up to me and grabs my right arm, and then they both start yelling at me to get on the ground, get on the ground, rapidly and loudly. And then Trooper Bryce Weight tries to foot sweep me and take me down to the ground, which he -- he missed my foot. But at this time, after I've had -- basically, do not know what's going on whatsoever. I have no idea why they're yelling at me, why they're

[p.80]

trying to tell me get on the ground. But at thi -- the point I say -- I said something, I say, what's going

on or something like that. I can't remember my exact words. I think it was, what's going on. They kept yelling at me to get on the ground, get on the ground, and trying to foot sweep me again. And finally, I -- as that short period of time went by, my -- I -- I -- I -- you know, I was like, whoa, you know, I'd better comply with what these guys are saying. They -- they -- they mean business. So still not knowing what's going on, I complied and got down, started getting down to my knees while they were jumping on me and trying to force me down on the ground. The reason why I was going so slowly is because I have back injuries and -- and I didn't want to further hurt my -- my back by just flopping on the ground, so I went down very slowly.

Q So you controlled the speed at which you were taken down to the ground?

A I -- I tried to. I didn't -- not really control. It's just, I didn't flop right on the ground. I guess you can say it's controlled. I -- I went down with them pushing on me.

Q All right. So I'm going to ask you a few more questions about that. So when you first approached

* * *

[p.83]

A You said at any -- any time, and I wanted to -- I wanted to rephrase my -- my -- my answer, being that -- being that it -- it did raise up after the fact that he -- after he assaulted me, my hand did come up during that -- that period, when he struck me.

Q Okay. So your version is that he -- why don't you describe what happened.

A After I made that statement to Trooper Bryce Weight and he said, no, and struck me with both palms of his hands in my chest, I went flying backwards. At that time he hit me, my -- my right hand had rose -- rosen [sic] up a little bit.

Q It rose up a little bit?

A Yeah, it rose .....

Q From where?

A From the side -- my side down here .....

Q And did .....

A ..... alongside my hand -- alongside there.

Q And your hand is down by your leg?

A Yeah. Well, it's down by my side, yeah.

Q Why don't you go ahead and stand up and show me where your right hand was when you stopped in front of Trooper Weight.

A Okay. This is how I recall it happening. I had it down, like -- kind of like this.

[p.84]

Q So it's by your -- your right hand is about five inches from your hip?

A Yeah, out like this, probably, holding it at this -- like this.

Q You were holding it with your palm up when you went to Trooper Weight?

A No, I walked up to him and I stopped and I probably was standing here like this.

Q Standing with your -- both arms out about five inches from your hips?

A I was holding my beer in this in hand like this. I was holding this hand, probably down something to this (indiscernible - simultaneous speech).

Q And you said Trooper Weight said, no.

A Uh-huh.

Q And then he -- how did he push you?

A Do you want me to demonstrate by showing you?

Q Well, you can just verbally say how he pushed you.

A He lunged forward at me and struck me with force with both his palms of his hands against my chest.

Q Okay. And where -- he put both hands on your -- on -- his right hand and his left hand on your chest.

A Simultaneously on my chest.

Q And pushed you back?

A And hit -- knocked me back.

* * *

[p.95]

immediately down?

A Not immediately. It took me a second or two seconds to easily slide out, because I wanted -- I didn't want to just flop down on the ground, so I -- I slid out -- my arms out and went down prone like this.

Q Why didn't you immediately go down to the ground when the officers pushed your back?

A Because I was still in shock. I didn't know what -- what was going on and I'm -- I'm trying to process this, so it -- it takes you a few seconds to process a command like that. When someone is yelling at you, you're in a state of shock and you don't know what's going on. I was -- I was -- I was -- I was confused. So then I -- I -- finally, after I had time to process what they were saying to me, because this happened so quick and forceful, then I -- I slid out, like I just explained to you, onto my -- onto my chest and down to the ground.

Q And when you slid out, you relaxed your muscles?

A I was laying on the ground.

Q Did you relax .....

A Yeah, I was relaxed.

Q ..... your muscles?

A I was -- I was laying on the ground like this, had my arms up, just laying on -- on the snow in front of me.

* * *

[p.99]

Q Immediately over to the trooper vehicle?

A Yes. I believe it was immediately.

Q Okay. And then what?

A Then -- then they held me there and I still, at this point, didn't know what was going on. I had no idea. I hadn't been told anything by any of the troopers involved. And -- and I -- I mentioned I asked what -- what -- you know, what's going on? And Trooper Nieves just says, you're -- you're -- you're going to jail. And I go, for what? And he goes, for harassing my trooper. And this is by -- when we're over by the vehicle. And I said, I was not harassing your trooper. And he -- then he made a statement and said that I -- I could have walked away. And I go -- and then I made the statement of, I want your commanding officer right now. And he said, he is the commanding officer. He's the sergeant in charge.

Q Anything else?

A Yeah, at the point after they had me handcuffed and next to the vehicle, he puts me inside the vehicle and go and he said, bet you wish you would have talked to me now, while he's standing in the doorway with the door open. And I said -- I said, what -- what are you ta -- I said, that's ridiculous, something to that respect, what are you talking -- that's ridiculous.

[p.100]

And why am I being arrested? And -- and then he goes -- and then he says, you're done. And I go, no, I'm not done. And he shuts the door. And that was the last time I remember seeing Trooper Nieves.

Q Did you speak to Trooper Weight at any time after the arrest?

A I do not recall.

MR. WILSON: Ms. Moore, can I make one point for you? Just in terms of, if you could consider what he said there an amendment to his depo -- or his interrogatory responses. There was a spot in there where, you're done and this and that, was a little confusing in his interrogatory response and .....

MS. MOORE: If you want to ask follow-up questions, you're free to do that and .....

MR. WILSON: Okay. That's fine. I'm not going to ask him a question. I'm just letting you know .....

MS. MOORE: Well .....

MR. WILSON: I'm asking you to consider that an amendment to his response.

MS. MOORE: And you can amend the responses.

MR. WILSON: I just did.

Q So have you had any medical care at all associated with your arrest?

A No.

* * *

Exhibit D

In The Matter Of:
RUSSELL BARTLETT v.
LUIS NIEVES, et al.,

LUIS NIEVES
July 31, 2015

Metro Court Reporting
405 West 36th Avenue, Suite 201
Anchorage, Alaska 99503
metro@gci.net

* * *

[p.16]

Q ..... you tape record it. Okay. I got a little different question than that.

A Okay.

Q My question is, you walk up to Ms. Moore on the street .....

A Right.

Q ..... and you're going to approach Ms. Moore and you want to ask her questions about a shoplifting incident.

A Right.

Q Okay? Is -- have you -- is it -- have you been told that in that context you should activate your recorder?

A Yeah, we should.

Q Whenever possible, right?

A Whenever possible.

Q And has anybody explained to you why that -- I mean, given you the reasons for that? You understand the reasons why you've been told that?

A Yeah. It's to help refresh your memory and also to preserve evidence if a -- if -- if something evidentiary comes from that -- from that accounting.

Q And have you found that it serves those purposes well in the course of your career?

A Yes.

Q What have you been -- what kind of training have you received about the importance of whenever you conduct an

[p.17]

investigation you filed -- you're going to file charges against somebody, you've arrested them, that you gather all of the evidence that's available to document what occurred?

A We do the base -- best of our ability and yes, we -- we're instructed on gathering all the evidence that's available.

Q Okay. You've been told that's how you should be a police officer, right?

MS. GALBRAITH MOORE: Objection, form of the question.

Q (By Mr. Wilson) She makes – just so you know, she makes objections. Unless she tells you not to answer you just go ahead and answer. All right?

A All right. So, yeah, we -- I mean – re -- repeat the question again?

Q Sure. You – you're at the point where you've completed your investigation.

A Right.

Q You've – you've arrested somebody. You know you're going to file charges against them.

A Uh-huh (affirmative).

Q Is it appropriate -- have you received training at that point in time to say, hey, let's try to round up all the evidence that would support the accusations we're making

[p.18]

against this defendant?

MS. GALBRAITH MOORE: Objection, foundation, form.

A We present whatever evidence we have right then and there. If there's more evidence then -- that we feel that we're directed by the DA or during the course of our investigation hey, we may need more to support these charges then we'll go and gather that evidence. Otherwise, whatever's present at the time whether it be observations and testimony of fellow -- fellow officers on scene, witness statements, that's the kind of evidence that we're going to be gathering.

Q (By Mr. Wilson) Videos?

A If -- if they're available and we know the video was taken, if we know the quality of the video whether the video is going to applicable, yes.

Q So, your training has been that if you know there's a video of an incident you've been involved in where you bring charges you should gather that evidence?

MS. GALBRAITH MOORE: Objection, ...

A No.

MS. GALBRAITH MOORE: ..... foundation.

A No.

Q (By Mr. Wilson) Okay. Tell me what's -- what's wrong with that statement?

A Because it .....

* * *

[p.20]

that's -- that sort of thing.

Q (By Mr. Wilson) Let's go back to even your example of a -- of the cell phone incident that you see someone with a cell phone taking -- let -- per -- appearing to take video of an incident .....

A Uh-huh (affirmative).

Q ..... you're involved in. There's nothing stopping you from going up to that person and asking them if you could obtain a copy of that video, correct?

MS. GALBRAITH MOORE: Objection to the statement calling for a legal conclusion, foundation, form.

A It's -- it -- it depends. I mean, it depends on the scenario, it depends on -- I mean, it -- it depend -- every situation is different. I can't give a blanket statement to whether we go to every single person that we think is pointing a phone at us for example.

Q (By Mr. Wilson) That wasn't my question. My question actually was, there's nothing stopping you from going up to that person if you want to and saying, hey, I -- it looked to me like you were taking a video here, could I get a copy from you?

MS. GALBRAITH MOORE: Objection, foundation.

A There's -- I don't see that there's anything that would stop me from asking.

Q (By Mr. Wilson) Do you make charging decisions against

[p.21]

an individual based on whether or not you perceive that they've cooperated with you?

A No.

Q Do you make charging decisions against an individual based on whether or not you perceive they were polite?

A No.

Q Is there anything about somebody's demeanor at a scene that would impact your decision making when it comes to whether or not you would advance a charge?

MS. GALBRAITH MOORE: Objection, foundation, form of questions.

A Not -- I mean, that's just too -- it's too broad of a question. There's too many it's -- there's too many dynamics involved for me to answer something like that because no two situ -- situations are the same ever, especially in this line of work.

Q (By Mr. Wilson) So, give me an example of when it would be in your mind a charging decision would depend on someone's demeanor?

A I don't know that -- I don't know about demeanor. I think it -- it's the totality of -- of the situation. For instance, if you're doing a traffic stop you stop two people for the same exact sp -- speed violation and one person tells you that the reason I'm speeding is 'cause I'm late to the Aces game and the other person tells you

[p.22]

I'm late because my baby's -- my wife's about to give birth. They both essentially have committed the same violation but you -- we have the latitude to treat those two scenarios differently so it dep -- it depends on the facts.

Q Okay. So, let's take this scenario. You pull over one person over for speeding doing 55 in a -- in a 35 or whatever, you know, ...

A Uh-huh (affirmative).

Q ..... 55 in 50.

A Okay.

Q And that person is polite and cooperative and they say hi to you and they answer all your questions and you decide that you don't want to advance a charge against them for whatever reason. Okay. That's one scenario. Now, we have another scenario where you pull somebody over and the same exact circumstance, they're doing 55 in a 50. You walk up to them and you ask them for their ID and they produce it to you and then you ask them what are you doing and they say I don't ha – I got nothing else to say to you.

MS. GALBRAITH MOORE: Objection, form, foundation.

Q (By Mr. Wilson) Does that in your mind give you some indication as to whether or not you should charge that individual with that ticket?

* * *

[p.28]

A I was – I was the one in charge.

Q You were the Sergeant?

A I was – yes, and I was the senior person present and the senior person on call and on shift at the time.

Q When -- let me back up here. And how did it come about that a -- the Channel 2 news crew was at the Arctic Man with the pol -- with the Troopers?

A They made a request through the Public Information Office at Headquarters and they received permission to ride with the -- with the Alaska State Troopers to observe the Arctic Man, the event. And Lieutenant Piscoya directed me to have the news crew ride with me.

Q Did you play any role in Lieutenant Piscoya's decision to have the news crew ride with you?

A No.

Q I mean, did you -- did you request it?

A No, I was assigned.

Q Do you believe that having a news crew with you in any way impacts how you go about doing your job as a police officer?

A No.

Q When did you arrive at the party that -- I mean, I'll ask you this. If we can ref -- if we refer to it you understand what I'm saying at .....

A Uh-huh (affirmative).

* * *

[p.30]

the Troopers and the public.

Q And -- so, at the time you respond to Mr. Sadler's party you have this TV crew with you, is that correct?

A Yes, it's one cameraman with a camera.

Q And who was that cameraman?

A I don't remember his name.

Q Does John Thain ring a bell?

A Yes. Yes, John Thain.

Q And at the time you arrive you know that this cameraman, Mr. Thain what he's up to is he's following around with you videotaping, correct?

A Yes. He's making the news story.

Q How long had you been with Mr. Thain prior to your arrival at Mr. Sadler's party?

A I think several hours. I'm not sure there -- how long but it was several hours at that point.

Q And as part of this cameraman thing you were mic'd up with -- with something specific to the cameraman or you had your own mic or how was it .....

A No. They -- they placed a mic on me, Mr. Thain placed a mic on me.

Q And how did he -- how did he do that, what did he do?

A It's their wireless mic, it has like a -- a little box receiver and then a -- a microphone similar to what I'm wearing right now and it's a wireless.

* * *

[p.38]

Q And you knew that before you got out of the vehicle and approached Mr. Sander's party, correct?

MS. GALBRAITH MOORE: But -- okay.

A I don't know what he was filming at that point.

Q That's not what I asked you. At at -- my question was you knew that the reason he was there was to videotape to make a news story and you knew that before you got out of the car and approached the Sadler party?

MS. GALBRAITH MOORE: Objection, form of the question and foundation.

A I knew that he was riding with me to film Arctic Man to make a news story, yes.

Q (By Mr. Wilson) And you knew that before you got out of the car to approach Mr. Sadler's party?

A I knew that before I even left headq -- the command center with him.

Q At -- the -- this -- we'll come back to this but after we get done with you -- after you've dealt with the situation there at Mr. Sadler's party did you ever go back to Mr. Thain and ask him whether or not he had videotaped any of these events so that you could have that record of these events?

A No.

Q Why didn't you ask him?

A It's not my -- it's -- it's not my property. It's and

[p.39]

I -- and I don't know what he was recording, I don't know when he turned on his recorder or not.

Q And the way you answer those questions is you ask him, right?

A I had no obligation to ask him.

Q Whether you had an obligation to or not why didn't you?

A Because I had no obligation to do so, there was no reason to.

Q So, you have somebody who probably is videotaping the events that take place in which you're going to charge somebody with a crime and your testimony is that you have no reason to ask them whether or not they videotaped .....

MS. GALBRAITH MOORE: Ob .....

Q ..... those events?

MS. GALBRAITH MOORE: Objection, form and foundation.

A He -- he's a member of the media, I have no idea nor any control over what he's filming, whether he turns on his recorder or not. My obligation is to ensure that my officers are safe, that people are obeying the law and if someone's sa -- needs to be arrested they're arrested.

Q (By Mr. Wilson) Go back to my question. Is it your testimony that you go to a incident like this with Mr. Sadler's party, you jump on somebody, physically arrest them, okay, intend to bring charges against them and that

[p.40]

there is quote: No reason to ask the video guy whether or not he video recorded those events, is that you testimony?

MS. GALBRAITH MOORE: Objection, ...

A I .....

MS. GALBRAITH MOORE: ..... form, foundation. That's -- that was not his testimony and don't -- don't try .....

MR. WILSON: Well, whatever.

MS. GALBRAITH MOORE: ..... (indiscernible - simultaneous speaking).

MR. WILSON: That's -- that's why I'm asking him.

MS. GALBRAITH MOORE: (indiscernible - simultaneous speaking) those face were not on the table.

A No. My -- my obligation is to figure out why your client was trying to attack my -- my Trooper and why your -- your client was being aggressive toward my Troopers and why we eventually had to arrest him because he was acting in a manner that wasn't reasonable and was creating a dangerous situation for all my officers there.

Q (By Mr. Wilson) Let me ask the question a different way and hopefully I can get an answer this time. Why isn't that enough of a reason to go to the -- Mr. Thain and say, hey, you just were there, right there acting like you're videotaping this that's going on here, did you actually videotape it? What .....

[p.41]

A There's no obligation.

Q Mr .....

A We have more than enough .....

Q ..... Mr. Nieves I'm not asking .....

A ..... we had more than enough.

Q ..... about your obligations, okay.

A Uh-huh (affirmative).

Q I'm asking you why isn't that a sufficient reason to ask him?

MS. GALBRAITH MOORE: Just for clarification what is the that? Why didn't -- what is .....

Q The incident that took place with Mr. Bartlett, the fact that you know Mr. Thain was there probably videotaping it, why isn't that a sufficient reason for you to ask Mr. Thain whether or not he videotaped the events?

A I don't know if he recorded and I didn't need anything from him at the time because I already had testimony from my Troopers that were on scene

and my observations of a crime that was committed which was disorderly conduct and resisting arrest.

Q And you also knew that none of you there were activating your tape recorders to record the events, correct?

A I had no idea.

Q Well, you knew you hadn't, ...

A I had no .....

[p.42]

Q ..... right?

A I knew that I – I hadn't at the time but I had no idea whether or not any of my other Troopers had activated or deactivated. I had no idea.

Q Well, they all carry the same device you carry, right?

A Some of them do. I – well, let me see, some have the new ones, some have the old ones and I don't know who had what.

Q Well, given the importance of audio recording, we've talked about your training and that, why didn't you at that time inquire and determine whether or not anybody had audio taped these events?

A Because all of the Troopers were able to document what they saw.

Q So, everybody just needs to believe what the Troopers say and that's fine enough for you?

MS. GALBRAITH MOORE: Objection, form, foundation.

A Well, there's -- there's no history of dishonesty among any of the Troopers involved. We have a -- a -- a -- we -- our hiring practices clearly show that between our -- our backgrounds, polygraphs, psychological examinations that far exceed any backgrounds that any attorneys or any other profession go through. We -- I mean, when you even look at Troopers right now, Alaska State Troopers will have thousands of people apply, only a dozen people will

[p.43]

get hired. I mean, we -- we are set apart, we're set apart because we're known to be honest, we hold people accountable for criminal activity and that's what we do. I mean, we're -- we're -- we have a solid reputation.

Q (By Mr. Wilson) Well, why don't we just .....

A A very solid reputation.

Q ..... dispense with the advice you received at your training that you should -- I mean, why don't we just go ahead and get rid of the re -- the requirement that you tape record things because according to you it's good enough to just take whatever the Troopers say as gospel?

MS. GALBRAITH MOORE: Objection, form, foundation.

A It's -- that's why it's not mandatory in all loca -- in -- in all situations. People understand that Troopers

we're -- we're held at a higher standard and that's why weren't not able to hire every -- hire everyone and anyone that applies for the position. We're held to a higher standard and there was multiple Troopers there.

Q (By Mr. Wilson) So, the long and the short of it is you never asked Mr. Weight whether or not his recorder was activated, is that correct?

A Is -- repeat the question. I'm sorry.

Q Did you ever ask Trooper Weight on the evening of these events whether or not he had activated his recorder?

A I don't remember if I did.

[p.44]

Q Did you ever ask Mr. Thain who was standing there pointing the video camera at these events whether or not he had videotaped these events?

A I don't believe I did.

Q At what point did you -- did it come to your attention that there was no audio of these events?

MS. GALBRAITH MOORE: Oh, a -- it -- and -- objection, form, foundation. Whose audio are you talking about, Mr. Thain's or the Troopers?

Q (By Mr. Wilson) No, Trooper recorded audio of these events.

A Didn't realize it until after we had already done the reports and the person was already -- your defendant was already in the -- in custody and --

Q So, at the point -- so, and what was that point? Give me the date and time as best as you can recall.

A I'm not sure. Maybe -- I don't know if it was later that day or sometime shortly after Arctic Man. I don't remember.

Q At the point you learned that there was no Trooper audio documenting the events with Mr. Bartlett why didn't you at that point ask Mr. Thain whether or not he had a video of these inci -- of this incident?

A Still wasn't necessary. We had multiple Troopers present that all saw the same thing and all testified to it.

[p.45]

Q And who are these multiple Troopers that all saw the same thing and all testified to it?

A Yeah. Trooper Weight and I, I mean, that's two Troopers, that's more than enough.

Q Is it -- do you ever have the thought go through your head that it's not up to me to determine what's enough that it's up to the -- ultimately the jury and possibly the defendant to say that hey, it's not up to Trooper Nieves to determine what's enough. I should try to do everything I can to document the situation?

MS. GALBRAITH MOORE: Objection, form and fo .....

Q Have you ever had that thought?

MS. GALBRAITH MOORE: Objection, form, foundation.

A We presented everything that we needed to hold your defendant accountable for his criminal activity that day.

Q (By Mr. Wilson) That's not my question. Okay.

A That's my answer.

Q Well, let me go back to my question. Have you ever had the thought that it's not up to you to make that decision as to whether or not it's enough to just count on what you and Trooper Weight say and disregard gathering evidence that could definitively establish one way or the other whether what you say is true or false?

MS. GALBRAITH MOORE: Objection, ...

A We .....

[p.46]

MS. GALBRAITH MOORE: ..... form, foundation.

A We provided all the information necessary with our testimony of what happened that day.

Q (By Mr. Wilson) That's not my question. You want to sit here all day and answer the -- I mean, I'd asked you to answer my question. Have you ever had that thought that that's not your decision to make,.....

A No.

Q ..... that that's something -- you've never had that thought?

A No.

Q Okay. Thanks for answering my question. See how easy that is.

MS. GALBRAITH MOORE: Mr. -- Mr. Wilson.

MR. WILSON: Well, hey, I just wanted him to answer my question and then I won't get like this and we don't need to go down this path. Okay. When I ask the same question three times it starts to irritate me. I apologize.

Q When did you -- at what point in time did you discover that, in fact, Mr. Thain had videotaped at least a portion of these events and still had some video evidence of that?

A I believe it's when the ADA had advised me of -- he had asked the DA to ask me if -- if I was aware of footage and I believe that at one point someone brought to my

* * *

[p.65]

started speaking?

A I believe I tapped him on his shoulder, he turned around.

Q Okay.

A And .....

Q And what did you say?

A I said, hey, Mr. Bartlett I just -- well, I didn't know what his name was then -- I said hey, sir, I -- I just

wanted to explain to you why we're here right now. As you saw we're trying to secure the alcohol and he starts yelling at me saying that I don't want to talk to you, I don't have anything to say with -- say to you, you need to get out of here if you're done. So, at that point I had to make a decision. You know, it's -- this guy is highly intoxicated, he's not being reasonable, do I stay here and then run the risk of now he ends up crossing that line and becoming disorderly or can I just leave and defuse the whole situation. I chose to leave.

Q And what was it that you believed that indicated to you that Mr. Bartlett was highly intoxicated?

A Slurred speech and white watery bloodshot eyes, thicks -- the -- his level of aggression which made zero sense to me, and his failure to understand the circumstances, the fact that there's juveniles consuming alcohol and the fact that that's actually a danger.

Q And where is it in your supplementary report where you

[p.66]

talk about your observations of Mr. Bartlett and him being highly intoxicated?

A I didn't mention it there.

Q And why is that?

A There was no need at the time. It was the fact that he was a -- that he was combative and the facts of the case was that he went -- he created a hazardous situation for my Trooper.

Q So, you -- are you telling me, I mean, we've talked about it's important when you write a report to put the important details in, right?

A Right.

Q Okay. Do you think it's unimportant to your report that your ob -- observations and your claim that Mr. Bartlett was highly intoxicated?

A No, I -- I mentioned that he was combative, I mean, that's --

Q Is combative the same thing as intoxicated?

A Well, there's no -- there's no -- there's no -- you can't use alcohol as an excuse for being combative.

Q Well, actually let me ask you. Where is it you say he was highly combative?

A Where he -- where he began shouting. I mean, that's completely .....

Q Okay. Read the words .....

* * *

[p.80]

MS. GALBRAITH MOORE: You can answer the question, it's okay.

A No, I can't read minds.

Q Okay. And so, this idea that you have, I mean, you -- you watch this video and according to you -- you're looking at the same video I am, right? And you look at that video and your conclusion is that

Mr. Bartlett was just getting ready to attack Mr. Weight, right?

A Yes.

Q And the fighting that Mr. Bartlett does to you -- does with you that you're describing do you believe at least that it's fairly and accurately depicted on this video?

A To -- to the best of my observations and from what I'm seeing yeah, it confirms what I saw at the time, what I perceived was happening at the time.

Q Did you perceive something to be happening in terms of Mr. Bartlett fighting with you that you believe is not captured by the video?

A The tensing, the -- the amount of force that we had to use to restrain him, that's something that you're never going to be able to see on video.

(Pause - reviewing documents)

Q Do you agree with the general concept that when you have a Trooper who is by himself that is the point at which they are most vulnerable to being harmed?

[p.81]

MS. GALBRAITH MOORE: Objection, form, foundation.

Q (By Mr. Wilson) As opposed to whenever there is two Troopers, ...

MS. GALBRAITH MOORE: Same objection.

Q ..... I guess my -- I'm just kind of my -- what my question is going to be?

MS. GALBRAITH MOORE: Same objection.

A I -- I mean, it -- it's hard to answer that. It's very difficult to answer that.

Q (By Mr. Wilson) Let me ask you thi -- ask it this way then. In this particular incident here do you believe that Mr. Weight was safer there by himself conten -- contacting Mr. Bartlett than he was after you arrived at the scene?

MS. GALBRAITH MOORE: Objection, form of the question.

A I -- I think that your client made it unsafe for any number of Troopers being there.

Q (By Mr. Wilson) Can you answer my question?

A I believe I did answer your question. The situa -- it depends on the situation. In this particular situation I don't know that we had enough Troopers to handle your client. It's scenario based.

Q But -- and .....

A I answered your question, it's scenario based. It -- I

[p.82]

can't .....

Q No, my .....

A ..... I can't give you a blanket answer on that.

Q This is the scenario. Okay.

A What's a .....

Q I'm asking you about this scenario. I understand that, ...

A Yes.

Q ..... you understand that.

A My Trooper was not safe with your client one on one in that scenario.

Q Okay.

A And that is why I responded.

Q I understand that's your opinion.

A No, that's a fact .....

Q My .....

A ..... and your client's actions .....

Q ..... but my -- I'm actually asking .....

A ..... confirmed it.

MS. GALBRAITH MOORE: Wait. Wait .....

Q ..... a little different question .....

MS. GALBRAITH MOORE: ..... for a question.

Q ..... than that.

A Uh-huh (affirmative).

Q Okay. My question to you is regardless of what Trooper

[p.83]

Weight's safety was or wasn't at the point you arrive it is a safer situation for Trooper Weight than at the point prior to your arrival?

A That's the hope.

Q And do you have some basis to say that hope was not the reality of the situation?

A No, because your client kept fighting and ho -- luckily we were fit enough to overpower him eventually.

Q Who initiated the physical contact in this case, Mr. Nieves?

A You client initiated when he brought the fight to my Trooper.

Q Who is the first person who made physical contact with the other person in this case?

A Where my -- where my Trooper cleared your client that would -- would be my Trooper defending himself.

Q And do you receive training on -- I mean, is that an official police maneuver is to shove people?

A You make space, yes it is. You make space between -- that way we can access our other tools.

Q Would you agree with me that everybody at this party was standing a little bit closer to each other than would be normal without the music playing in the background?

MS. GALBRAITH MOORE: Objection, foundation.

A Not everyone at this party was yelling and screaming at

* * *

Exhibit H

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
AT FAIRBANKS**

Case No. 4:15-cv-4 SLG

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
vs.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Defendants.	)

DEPOSITION OF JERRY SADLER, II
August 10, 2015

APPEARANCES:

FOR THE PLAINTIFF:

ZANE D. WILSON
Cook Schuhmann & Groseclose
714 Fourth Avenue
Suite 200
Fairbanks, Alaska 99701
(907) 452-1855

FOR THE DEFENDANTS:

STEPHANIE GALBRAITH MOORE
Department of Law
Attorney General's Office
1031 West Fourth Avenue
Suite 200
Anchorage, Alaska 99501
(907) 269-5190

* * * *

* * *

[p.9]

A Standing above the doorway.

Q Okay. Now, you said you watched this video that got played by Channel 2 News, right?

A Yes.

Q Is that you standing in the doorway the trooper is talking to?

A Yes.

Q It is you.

A Mm-hmm.

Q Is there any doubt about it's you?

A Nope. I had full interaction with the cops -- or with -- what was the name of the --

Q Trooper Nieves.

A Trooper Nieves. I was in contact with Nieves for maybe two minutes standing in the doorway of my

RV, him standing directly outside of the door of the RV, and a camera directly behind him. So I don't know if I saw the -- I think I -- I believe I was standing on the other side of the party when the troopers approached the RV door. And I kind of looked over there and I was, like, oh, okay. I should probably go -- go speak with them. You know, I am the owner of the RV. So I went -- and I don't -- this is two years ago.

Q Yeah.

A But most of my conversation with him was in the doorway --

[p.10]

Q Okay.

A -- which was pretty short. It was just, you know, a -- was very nice. And, you know, just let me know that he had noticed a minor at the -- at my party and that I should -- that he would like me to put my alcoholic beverage keg inside. And so we immediately pulled that inside. You know, he thanked for my cooperation, and we thanked him for being there and, you know, supplying he that -- that -- you know, that slight hand of law of, you know, coming in and -- you know, obviously, I don't believe there was a moment where that juvenile was standing there drinking from it and he approached and saw that; but, of course, his concerns became my concerns and, yes, I put the keg inside. And, actually, no problem; I'll hide that in there. But, yeah, I thanked him. And he walked back off with the camera, and they continued to -- what was it called, crowd control?

Q Sure.

A Crowd control in, like, a half moon of troopers for about another 45 minutes to an hour.

Q Okay. Let me ask you a question now. So when the trooper is talking to you, do you hear anybody who was hollering at you and/or the trooper?

A No. No. I mean, at least not -- like, I'm standing in an RV. There's music in the background. I hear him speaking

[p.11]

to me. If someone was yelling to a certain degree off to the side of him, you know, I don't – I don't remember that. But he never, like, lost his attention with our conversation and looked elsewhere.

Q So there was nothing -- while the trooper is talking with you, there's nothing that distracted the trooper in any way, like, where he looked off to the side or anything like that. He stayed focused on you; is that correct?

A Yes.

Q And you did not hear anybody hollering or screaming and saying that you didn't have to talk to the trooper?

A No. But, like, that -- that background -- like, someone saying that in the background would be so -- you know, like, I don't think it would have caught my attention, you know.

Q Okay.

A I thought, you know, generally, any time there's an interaction with law enforcement, there's someone mumbling off to the side, you don't have to -- you know, that someone that knows -- think they know the law –

Q The law –

A -- and then –

Q Sure. And all we can ask you about is what you heard or didn't hear.

A Yeah.

[p.12]

Q Okay. So you didn't hear any such thing of anybody hollering in the background, correct?

A Not to the degree to where it distracted our conversation.

Q Okay. And, in fact, did the trooper ever come into your RV?

A No.

Q At any time, did he come in the RV?

A No.

Q Okay. Do you remember anybody saying -- hollering that the trooper could not come in your RV? Do you remember anybody shouting that – saying, hey, he can't come in the RV, or anything like that? Again, what you can tell us. I mean, all you know is what you heard.

A No. You know, I definitely -- I can't say -- it's very vague, but no. I don't think I would have let him come in regardless. And he had no reason to.

Q Okay. And, in fact, you said you listened to the audio, correct? You've watched the video, and there's audio on the video you listened to?

A Mm-hmm.

Q Did you hear anywhere on the audio or the video -- I guess the audio portion of it -- anybody hollering in the background?

A Not exactly. But -- no.

Q Okay.

* * *

Exhibit I

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
AT FAIRBANKS

Case No. 4:15-cv-4 SLG

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
v.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Defendants.	)
	)

AFFIDAVIT OF SIERRA CONTENTO

STATE OF ALASKA	)
	) ss
FOURTH JUDICIAL DISTRICT	)

I, Sierra Contento, being first duly sworn, depose and state as follows:

1. I am over the age of eighteen years and am a resident of the Fourth Judicial District in the state of Alaska.

2. On April 13, 2014, I was attending the Arctic Man event in the Hoo Doo Mountains, specifically a lawful gathering in the parking lot of said event.

3. Sometime during the evening, Alaska State Troopers came to our parked motor home and asked us to put our keg of beer inside the motor home. I was the one who opened the door to speak to them. While we spoke, I was standing in the doorway of the motor home. There were clothes and things scattered all over the inside of the motor home, so there was no room for anyone to really enter the motor home. At best, the trooper stood on the second to the bottom outside stairs of the motor home. He never walked around inside the motor home or searched anything inside the motor home but he may have stuck his head in.

4. I did not hear Russ Bartlett shout at anyone from our motor home that we did not have to speak with the troopers or allow them in the motor home.

DATED this 10 day of February 2016.

/s/Sierra Contento
Sierra Contento

SUBSCRIBED AND SWORN to before me this 10 day of February 2016.

[SEAL] /s/Niki Lightly
Notary Public in and for Alaska
My Commission Expires: April 13/18

* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]

Exhibit K

In The Matter Of:
RUSSELL BARTLETT v.
LUIS NIEVES, et al.,

BRICE WEIGHT
July 31, 2015

Metro Court Reporting
405 West 36th Avenue, Suite 201
Anchorage, Alaska 99503
metro@gci.net

* * *

[p.25]

they provided breath samples. They confirmed they had alcohol on their breath. There was a third individual that was contacted, I couldn't tell you the exact location within that little area but that individual had been drinking as well, another teenager. And so, Trooper Minor -- we were kind of getting backed up on paper -- Trooper Minor got into his patrol vehicle, parked of course, and got on his laptop inside the patrol vehicle and started issuing minor consuming alcohol citations. I continued to walk around the party area and look for other minors who had been con -- drinking alcohol.

Q And what happened?

A I contacted another teenager, he was very nice, he was very compliant. We were kind of in an area

where it was loud so I asked him to move off to the side with me so where I could kind of get him away from everyone else because there was a strong smell of alcohol right in that party area where there was more people. We moved off to the side. He was again, compliant. We were able to have a conversation and that's when Mr. Bartlett approached.

Q Okay. Let me back up here and ask you a couple of questions. In general in the area of this party would you agree with me that the noise was quite loud?

A If you were over by the RV or fire area it was loud.

Q Okay. Now, let's talk about specifically the area that

* * *

[p.35]

Q Sure. So, less than one minute. Can you give me a – it was at least a certain amount of time?

A It would – definitely it was not immediate. I'd say at least 30 to 45 seconds.

A Okay. And then what is the first part of the conversation that Mr. Bartlett participates in from your standpoint?

Q When Mr. Bartlett approached he was visibly angry, you could tell the way he was talking to me he was angry. The harshness in his voice and again, I can't tell you the exact words that he was saying but it was you have no right to be here, get out of here, you can not talk to this -- this kid. I tried to

explain to him who I was, what I was doing, and it was almost impossible for me to get a word out. He was talking over me, interrupting me, not letting me say anything verbally really. He was very adamant and it was obvious to me it didn't matter what I had to say. I could -- there's not anything I could possibly say or have said in that situation to get him to leave or exit the situation. There was nothing verbally I could have done, it was obvious to me.

Q Okay. So, and I understand you -- you're not giving us quotes but you conveyed the concept that Mr. Bartlett says you have no right to be here, he wants you to get out of here, you can not talk to this kid. You then

[p.36]

tried to explain your position on those issues with Mr. Bartlett and then what's the next -- what else happens in this conversation?

A He gets more ramped up as it goes on because I am not doing as he's basically commanding me to do. I'm not doing what he's telling me to do and he escalates his voice, his hand gestures, his overall demeanor becomes more hostile because I'm not complying.

Q So, from the time he arrives until the time you shove him is it a continuing escalating behavior on behalf of Mr. Bartlett, that what you're describing to me?

A Yes.

Q Okay. And so then I want to make sure I have any other conversations you had with Mr. Bartlett before you shoved Mr. Bartlett that you can recall?

A I tried to talk to him, I tried to explain what I was doing, it was not working. I was beginning to feel threatened and felt threatened for my own safety and the safety of other people in the area.

Q And what was it that Mr. Bartlett did that made you feel threatened?

A Well, he decreased the distance between myself and him, he absolutely put himself between me and the teenager that I had been talking to. The look on.....

Q Well, let .....

[p.37]

A ..... look on his .....

Q ..... let me -- let me interrupt you there. I don't mean to (indiscernible - fast speaking). What about him putting himself between you and the teenager made you feel threatened? Why does that make you feel threatened?

A Because -- and I want to get this right but -- by him putting himself between me and that person that could be considered he doesn't want to miss and accidently hit that person or if he's going to become assaultive he wants to kind of move that person out of the way, I guess you could say type of a deal.

Q Was that person ever in the way?

A Me and the teenager were talking and then he got in between us.

Q But was the teenager ever between you and Mr. Bartlett?

A Well, I think – well, Mr. Bartlett wasn't there when I was talking to the teenager initially. So, I would say as soon as Mr. Bartlett approached he interjected himself between us.

Q Okay. Fair enough.

A Yeah.

Q My question is, was there ever any point in time where the teenager was between you and Mr. Bartlett?

A I don't recall.

Q Can't say yes, can't say no?

* * *

[p.54]

face is very close to you, you took that to be combative in nature and therefore you pushed him away?

MS. GALBRAITH MOORE: Your question?

Q Am I reading that – am I understanding .....

MS. GALBRAITH MOORE: Objection, ...

Q ..... that correctly?

MS. GALBRAITH MOORE: ..... asked and answered.

A Yeah. You're -- you're reading it correctly but he also had his hands in my face.

Q (By Mr. Wilson) You say – okay. So, you're missing that part. All right. But you certainly -- is it your recollection that the hands, him almost touching you, his face was very close to you, you took those as combative and that was the final straw, you decided to shove him?

A It was everything up to that point. He was very angry and he was very hostile, I thought I was about to get assaulted.

Q And then you say I sh – pushed him away from me. Then you say, quotes: Russell came at me again.

A That was my recollection at the time I wrote the report.

Q And do you believe that's an accurate recollection?

A Having viewed the video I don't think it's 100 percent accurate.

Q Well, what .....

A I think it could have been at the time that's what I felt

[p.55]

but yeah.

Q Well, what percent accurate is it? You say it's something less than 100 percent, is it .....

A I've seen the video currently.

Q So have I.

A On the video it looks like I push him back and Sergeant Nieves grabs his hand at that point. When

I wrote the report my recollection was that he was turning to come back at me .....

Q Okay.

A ..... after I pushed him.

Q So, it would be 100 percent inaccurate Russell came at me again?

MS. GALBRAITH MOORE: Objection, form of the question.

A And – and again, at the time I wrote the report that's what I remembered. I don't have a video or I didn't have a video at the time that I could watch on the screen and go okay, so this happened, that happened. You understand?

Q (By Mr. Wilson) Sure. Let me come back to that but make sure I understand. As we sit here today you would agree with me that it is 100 percent inaccurate that Russell came at you again?

MS. GALBRAITH MOORE: Objection, form of the

[p.56]

question.

A I would disagree with you.

Q (By Mr. Wilson) Okay. And what part of that statement do you disagree with?

A That .....

Q We asked about what you know today, okay, what your belief is .....

A Uh-huh (affirmative).

Q ..... today, you tell me what's wrong with what I just said to you?

A And again, you're watching a two dimensional video of course, going off of that but without Sergeant Nieves grabbing his hands he was coming back at me. And I can't tell you what was going to happen because it didn't happen but it's my belief and it was my belief at the time if Sergeant Nieves hadn't grabbed his hand he was coming back for me.

Q But that's not what you said in your police report, right, you said he did it, he came back at you?

A That's what I wrote because that's what I recalled it at the time.

Q Now, you said you didn't have a video available to look at, right, that's your statement, correct?

A Correct.

Q In fact, what you could have done was you could have went

[p.57]

and asked the video guy who was there and say hey, can I look at your video?

A I -- I would disagree with that.

Q You couldn't have done that, it would have been impossible for you to do that?

A When I writing my report the video guy was not there that I recall.

Q Did you even look for him?

A I believe it was like 5:00 in the morning or 4:00 in the morning or whatever time in the morning it was and I was writing the report and they had gone home probably a couple hours -- or not home but they had gone back to where they were camping at, you know, ...

Q But .....

A ..... before that.

Q You were all at Arctic Man, right? I mean, the whole Arctic Man is what, a mile wide?

A I had no idea where they were staying. I had no idea what their names were, I had no idea what their phone numbers were.

Q You could have asked Sergeant Nieves that, correct?

A I could have asked Sergeant Nieves. I don't know if he had that information.

Q Having reviewed the video is it still your position that Mr. Bartlett attempted to head butt Sergeant Nieves?

[p.58]

A Well, I think watching the video it's a little -- even watching the video I think the timing or the -- not the timing, the chronological order of which that's put into the report isn't quite accurate. However, and again, this is watching the video I think there is a portion on the video where based off of where I was standing that I could have reasonably inferred that a head butt had been attempted.

Q Let me go back and ask you this. And be care – pay attention to what I'm asking you very specifically if you would please. At the point that Sergeant Nieves arrives to the point that Mr. Bartlett is on the ground and seconds away from being cuffed is there any of that video that is missing in your view, I mean, has it been edited in some way?

A I don't know what kind of editing they did.

Q No, that's not my question. My question to you, as you look at that between those two points, do you look at that and say ah-hah we're missing something here, they edited something out?

A Such as they took something out or added something in?

Q Correct.

A I – I don't believe so.

Q Do you believe that – that the – at – the point that's allegedly Mr. Bus – Russ – Mr. Bartlett attempts to

[p.59]

head butt Sergeant Nieves that point is on this video?

A I think it could reasonably be inferred from where I was standing relative to Sergeant Nieves and Mr. Bartlett that I could have reasonably believed he was being head butted or attempting.

Q You agree with me that Mr. Bartlett put his arms behind his back voluntarily, I mean, he – it was an action he took not an action you took for him?

A Eventually, yes.

Q Is there some point in this video that you believe shows that Mr. Bartlett took a swing with his right hand at Trooper Weight -- Trooper -- excuse me, Trooper .....

MS. GALBRAITH MOORE: Sergeant.

Q ..... Sergeant .....

MS. GALBRAITH MOORE: Nieves.

Q ..... Nieves.

MR. WILSON: Thank you.

A Did I see something on the video that was like a punch or a swing towards me? I did not see that on the .....

Q Nieves?

A ..... oh, I'm sorry, Sergeant Nieves. I don't recall seeing that on the video.

Q Do you recall seeing that at the time of the event?

A I don't recall.

Q In other words, you simply have no recollection of

[p.60]

whether or not he did or you did not observe any such thing to take place?

A Again, it was very dynamic. He was being given orders, he was not complying with those orders. I don't recall from what my memory if that happened

or not. Watching the video like you have already asked, it does not appear that way.

Q At what point do you realize that it's -- other than perhaps what took place with this video crew there is no audio between any of the Troopers there that really documents the events that took place between Mr. Bartlett and yourself?

A When do I realize that?

Q Yeah.

A Oh, probably when we were driving back to, you know, ...

MS. GALBRAITH MOORE: If you know.

A Yeah. Well --

Q If you remember?

A The -- the exact da -- the exact moment I realize there's no audio? I -- I don't recall.

Q Okay. Without getting down to the exact moment, give me your best estimate of when it became apparent to you that there was no audio of any of the Troopers involved in this documenting of these events?

A I don't know about all the Troopers when it came out

[p.61]

obviously because I -- I didn't know if Sergeant Nieves had audio going but as far as myself, you

know, it probably would have been after the arrest was made.

Q Did the thought ever occur to you to document in your police report that, in fact, this incident had been videotaped?

A No, it didn't.

Q Why not?

A I didn't have access to that video.

Q You didn't have access to it because you elected not to ask for it, right? Was there any other impediment that denied you access to that video other than just simply taking the steps to go ask the video person whether they had the video?

A And .....

MS. GALBRAITH MOORE: Objection, foundation, form.

A ..... and again, after the arrest was made I went back to the command post. Mr. Bartlett went to the holding tent and I don't recall ever seeing them after, you know, the arrest was made.

Q (By Mr. Wilson) I understand that but you certainly understood you were bringing forth charges against Mr. Bartlett related to this event, correct?

A He was being charged, yes.

Q Yeah. And wouldn't it be at that point in time where

[p.62]

you're going to -- you know you're bringing charges against somebody a time for you to reflect on what's all the evidence I can bring to bear relative to these charges?

A I could have seized every single person's cell phone that was there also because they might have videotaped it.

Q And you think that's how speculative it was whether or not this person who was walking around behind Mr. Nieves .....

A I have no idea .....

Q ..... videotaping the events .....

A ..... what they videotaped or didn't videotape at the time.

Q And you elected not to inform yourself as to those -- whether or not there, in fact, was a video?

A And again, I had no idea what they videotaped or didn't videotape.

Q I get that. You've said that twice now.

A I did.

Q That's not the question I asked you is the only problem we have.

A Sure. Ask again I'll -- I'll .....

Q Okay.

A ..... do my best.

Q You elected not to inform yourself to answer the question

[p.63]

as to whether or not it was or wasn't videotaped?

A Didn't really come up.

Q And it certainly wouldn't have escaped your attention would it, Trooper Weight, that if there was video of this incident that video could be a very important piece of evidence documenting what took place?

MS. GALBRAITH MOORE: Objection, form of the question, foundation.

A If I knew 100 percent there was video of the incident could that be important?

Q (By Mr. Wilson) Yeah.

A It could be important, yes.

Q You certainly grasped that at the time you're preparing this report, right? I mean, that's not a concept that you didn't – weren't capable of intellectualizing at that time, right?

A Sure.

MS. GALBRAITH MOORE: Within the next five minutes or so if we – if you need a break or I need a break so whenever you're -- it's good for you.

MR. WILSON: Okay. Why don't we just do it right now.

(Off record)

(Deposition Exhibits 1 and 2 marked off record)

(On record)

* * *

[p.76]

Q Did you talk with Mr. Nieves about Mr. Bartlett in any way before wrote your report?

A I'm assuming we talked about what happened. The only thing I specifically can like definitely remember is I kind of said to him and he kind of said to me like wow, we were really restrained, we really didn't use very much force when we could have used a lot more. I remember that conversation. We felt that we were very restrained given the circumstances. And Sergeant Nieves informed me after the incident that he had had contact with Mr. Bartlett prior to that which was news to me, of course.

Q And when did Sergeant Niev – at what point in time is this, how long after the incident is it that Sergeant Nieves makes this representation to you?

A I – I don't recall. It was after the incident happened.

Q Within 24 hours?

A Oh, yeah. Yeah. I'd say that shift.

Q That shift. Let me show you what's marked as State of Alaska 0235 and State of Alaska 0236. And you – you're welcome to read whatever you want to but I'll tell you what I'm going to discuss with you is on the second page.

A Sure.

(Pause - reviewing documents)

A Okay.

Q Okay. So, am I accurate to state -- and this is kind of

* * *

Exhibit L

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA AT FAIRBANKS

Case No. 4:15-cv-4 SLG

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
v.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Defendants,	)
	)

AFFIDAVIT OF RUSSELL BARTLETT

STATE OF ALASKA	)
	) ss
FOURTH JUDICIAL DISTRICT	)

I, Russell Bartlett, being first duly sworn upon oath, depose and state as follows:

1. When I approached Weight to express my opinion that MacCoy Walker should not be interviewed without a parent present, I did not attempt to get in between Weight and Walker, nor put my hands between them, but rather stood at a distance from each

of them as seemed appropriate to communicate over the loud music. Weight was closer to MacCoy Walker than I was to Weight.

2. Prior to Weight assaulting me I did not do anything that could have reasonably been construed as threatening to Weight's personal safety. If Weight was uncomfortable with how close we were standing he had plenty of time to ask me to step back before he elected to shove me and jump on me without any warning. Prior to Weight shoving me I did not have any indication that Weight was uncomfortable with my proximity or physically in fear of me.

3. After I expressed my opinion to Weight, he said "no," took a step forward, and shoved me forcefully on the chest with the palms of his hands. My hands rose up in reaction to Weight lunging at me/the shove and the next thing I knew someone was grabbing my left arm. At this time I had no idea that I was going to be accused of committing an unlawful act, as I had not done anything unlawful. I was then repeatedly told to "get back," and then repeatedly told to "get on the ground." I asked what was going on and received no response. I was verbally threatened with a taser, and I went prone on my stomach and voluntarily placed my hands behind my back. I hesitated going to the ground and quickly lying flat on the ground because I did not want to aggravate an earlier back injury and was trying to avoid getting my face shoved into the ground. If I had not controlled my descent to the ground Weight and Nieves would have shoved my face into the ground.

4. At no time during the altercation was I told I was under arrest. I did not understand I was being charged with a crime until I was told so by Neives

much later in the flow of events, as documented on the video. I did not charge at Weight or Nieves, nor did I attempt to throw any punches or to head-butt anyone. At no time did I attempt to harm Weight or Nieves, and the whole incident occurred in a matter of seconds.

5. Although I had a few beers on the night of my arrest, I had eaten dinner that night and was drinking moderately. At no time was I highly intoxicated nor was my speech slurred.

DATED this 15 day of March 2016.

/s/ Russell Bartlett

SUBSCRIBED AND SWORN to before me this 15 day of March 2016.

(SEAL) /s/Alexis R. Doran
Notary Public in and for Alaska
My Commission Expire: 2-14-19

* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]

Exhibit M

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA AT FAIRBANKS

Case No.: 4:15-cv-4 SLG

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
vs.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Defendants.	)
	)

DEPOSITION OF LAWRENCE PISCOYA
February 24, 2016

APPEARANCES:

FOR THE PLAINTIFF:

ZANE WILSON
Cook Schuhmann & Groseclose
714 Fourth Avenue
Suite 200
Fairbanks, Alaska 99701
(907) 452-1855

FOR THE DEFENDANTS:

(Via Telephone)

STEPHANIE GALBRAITH MOORE
Department of Law
Attorney General's Office
1031 West Fourth Avenue
Suite 200
Anchorage, Alaska 99501
(907) 269-5190

AISHA TINKER BRAY
Attorney General's Office
100 Cushman Street
Suite 500
Fairbanks, Alaska 99701
(907) 452-8986

* * * *

* * *

[p.5]

a lot of information you could provide, a lot of knowledge about various things, but I'm really trying to get an answer to a specific question. If you could focus on that, I'd appreciate it.

A Sure.

Q I'll try not to talk over you; you try not to talk over me. It makes it a lot easier for the court reporter. Is that fair enough?

A Sure.

Q And then sometimes I ask questions that are confusing, maybe con -- convoluted. You let me know if you don't understand what I'm asking, and I'll be happy to rephrase it.

A I will.

Q Okay? Lieutenant Piscoya, what's your occupation?

A Alaska state trooper.

Q And how long have you been in that -- in that field?

A About 22 and a half years.

Q And what is your current level of -- in that organization?

A Lieutenant with -- with the troopers.

Q And give me just some sense, as a lieutenant, what kind of a -- job duties does that entail?

A The supervision of sergeants who are in -- the sergeants are in charge of various posts or units or shifts. And the -- just about everything, you know, case-wise,

* * *

[p.17]

to a he-said/she-said situation.

A Sure.

Q Setting aside traffic -- you know, like, doing 60 in a 55 kind of stuff, what were the -- if you reflect on the last five years of cases in which you are aware where a criminal charge has been filed, what

percentage of those cases would have audio or video evidence, to your recollection? Give me your best estimate.

A I –

MS. GALBRAITH MOORE: Objection to form of the question. Are you saying audio or video?

MR. WILSON: I'll ask audio to start out with.

Q Just audio. Limit my question to audio, please.

A I don't know. I – I don't know. I've never compared the cases to where there's audio and not audio. I don't know.

Q Never paid any attention to it whatsoever?

A I have. I do pay attention. I mean, I review cases from my sergeants even today, and I – and I review, and I look over their cases, and I – I observe whether there's audio or not.

Q Let me just reflect my experience and see if you agree or disagree with it. I've been doing criminal work here in Fairbanks for 25 years. In my experience, 90 to 95 percent of the cases I'm involved in have audio. Does that seem out of the norm to you in any way?

[p.18]

A Nowadays, with digital recorders, it might be a little bit higher. Back then, not so much. Back – I can't give you a good estimate. I don't know. I mean, I could be wrong. I It could be close; it could be right. I –

Q Mm-hmm. That's fair enough. And I appreciate you just being honest with me about it. Let me try to ask the question another way. When you see a case and there is an audio, a criminal charge and there is an audio, does that stand out to you?

A I'll ask.

Q Get your attention?

A I'll ask. Sometimes when I review cases, they're not quite complete, all right? The trooper's not quite done. And I'll say, hey, was there audio? And then they'll either say yes or no. And then if there -- if there is audio, I'll say, well, I don't see it attached to the incident. Make sure you get it attached.

Q Prior to this particular case with Mr. Bartlett, had any police officer come to you and said, there is something defective about our audio recorders that we're using in 2014?

A On this very case?

Q Prior to this case. I know that that did happen in this case.

A Oh, yes. We have -- we -- this -- it's not a common

[p.19]

occurrence, but it's an occurrence.

Q Okay. And here's my specific question.

A Okay.

Q I'll rephrase it for you. Prior to this particular case with Mr. Bartlett, have you had any police officer

come to you and say, geez, Lieutenant Piscoya, these recorders that we have are defective?

A No. Not -- not to my knowledge. I -- they didn't address it with me. I mean --

Q That's all you can tell us about. Do you carry a recorder?

A I'm now riding the desk, and I'm more reviewing these and going to very few calls. I have a recorder on my desk. I have a -- I used to carry it in my shirt pocket, but I haven't been to a call in a long time, and I'm doing a lot of administrative work. I did when I was responding to calls, and I was expected to respond to calls.

Q And when you responded to calls and you had a tape recorder on it, did you activate your tape recorder?

A Yes. When I had time.

Q So you attended the trooper academy in Sitka?

A Yes.

Q And when did you do that?

A I began in September of 1993.

Q Did they have a -- do they have, or did they have, I

* * *

[p.60]

A I would have asked.

MS. GALBRAITH MOORE: Go ahead.

A I would have -- if -- I would have inferred -- I would have sent messages or something. I would have asked a few questions. And it could very well be in this report, and I -- I don't -- it's quite possible I phoned him. It's been a while now, so -- if this was the only case I'd been working, I probably would remember.

Q Sure. And I'm not trying to put words in your mouth or anything, but I just want to make sure I understand what you do know and what you don't.

A Absolutely.

Q At Arctic Man, do you have a policy of if you -- if a police officer goes into the beer tent, they should be with another officer?

A Yes.

Q And what's the purpose of that policy?

A Safety.

Q And explain the obvious, I guess. Why does it make it more safe? Why does that policy make the officer safer?

A Well, I mean, one could keep an eye on the other and, you know, there's hundreds of people in there that are heavily intoxicated. And, you know, law enforcement is not the most popular people in a bar, right?

Q I've never noticed that.

* * *

[p.62]

Nieves arrives on scene and, shortly thereafter, Officer Weight shoves Mr. Bartlett.

A Yes.

MS. GALBRAITH MOORE: Objection: form, foundation.

Q And going back to the concept we just discussed, isn't it true that Officer Weight would have felt safer whenever he had another officer with him who had just arrived on scene than he did before that officer was on scene there with him?

MS. GALBRAITH MOORE: Objection: form, foundation.

A Sure.

Q The answer is sure?

A Sure.

Q And if Officer Weight has now just received reinforcements that make him feel safer, would you agree with me, Lieutenant Piscoya, that that seems to be a rather unusual time for the officer, then, to exercise the use of force?

A I don't know. I don't -- I wasn't there. I wasn't making the decisions there. I wasn't there.

Q As you reviewed that video -- and we can play it again for you, if you'd like.

A No.

Q We could take a quick break. Is it your opinion that it's simply a coincidence that Officer Weight elects to shove Mr. Bartlett right as Sergeant Nieves and the video camera

[p.63]

arrive?

MS. GALBRAITH MOORE: Objection: form of the question, foundation.

A I don't know whether it's coincidence or not.

Q Are you a believer in coincidences?

MS. GALBRAITH MOORE: Objection: form, foundation.

A A coincidence could occur.

Q They happen.

A They happen.

Q If Officer Weight hadn't felt the use of -- the need to use force prior to Officer Nieves's arrival, can you give me some explanation for why it is he could have reasonably elected to use force after he got -- I mean, as soon as he gets there?

A I can't.

MS. GALBRAITH MOORE: Objection: foundation.

Q And, of course, one other thing an officer can do if an individual is too close to them and they feel uncomfortable is they could step back themselves, right?

A Yes.

Q And you would -- would you agree with me, that'd be a -- if you have time, again, that'd be a practical thing to do to avoid escalating the use of force?

A Sometimes. But sometimes not.

Q And what would be -- if you can, where you would say,

[p.64]

yeah, that seems like a practical thing to do and, no, it doesn't? Where do you draw that line, if you can?

A I can't. I can't give you specific circumstances where that occurs and where it doesn't occur.

Q I'd asked the district attorney this question, and I'll ask you. Are you aware of some crime called interfering with an investigation?

A No.

Q That's because one doesn't exist, right? To your knowledge.

A That's correct, yes.

Q If an individual is interfering with a police investigation such as Mr. Bartlett, from your perspective, I gather -- I mean, that's the allegation, at least in this case: he was interfering with the investigation -- is there some reason why the first appropriate response to that wouldn't be to say, hey, pal, you're interfering with my investigation; I'm going to have to ask you to leave?

A Maybe it did occur. I don't know. I wasn't there and I had –

Q If it didn't occur, would you want to see good reasons for why it didn't before force got used?

A Maybe. But there's – there's the time factor and things happen very quickly. And you make decisions quickly and things happen and develop and deteriorate very quickly.

* * *

[p.66]

cause to arrest.

Q Sure. And there is no law against being intoxicated, right?

A Unless you're in a licensed premise.

Q Right. Or you're an adult – I mean, as long as you're an adult.

A Yeah. Yeah. There's a couple of factors there.

Q And just because you're intoxicated doesn't justify the use of force against you, does it?

A No. That alone, no.

Q And even if you're intoxicated and you're rude, that doesn't justify the use of force against you, does it?

A That alone, no.

Q And going on to paragraph 2 here, (B) (2), it says, an officer will use force only to the extent that is

reasonably necessary in any given situation to accomplish the officer's lawful objectives, correct?

A Yes.

Q And -- and so whenever it says reasonably necessary, that concept kind of gets meshed with the idea of you don't escalate the use of force unless an additional level of force is reasonably necessary under the circumstances, correct?

A Yes.

Q And what this use of force policy suggests in -- in

* * *

Exhibit R

IN THE DISTRICT COURT FOR
THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT GLENALLEN

Case No. 3GL-14-25 CR

[Filed March 15, 2016]

STATE OF ALASKA,	)
	)
Plaintiff,	)
v.	)
	)
RUSSELL PAUL BARTLETT,	)
	)
Defendant.	)
	)

VRA CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

DOMESTIC VIOLENCE OFFENSES
Per AS 18.66.990(3) and (5)
[ ] ALL COUNTS [x] NONE [ ] SPECIFIED BELOW

REQUEST FOR DISCOVERY
PURSUANT TO ALASKA CRIMINAL RULE 16

1. All materials discoverable under Alaska Criminal Rule 16.

2. A list of the witnesses which the prosecution may call at trial with any record of prior criminal convictions.

3. Any information tending to negate the defendant's guilt or reduce the punishment for the offense.

4. Any and all notes or police notebooks made by any or all officers investigating this case.

5. Any tape recordings made during the investigation of this case.

6. A copy of the AJIS for the defendant in this case.

7. Any and all notes or police notebooks made by any officers or other agents of the State investigating the defendant.

8. Any and all written laboratory reports concerning any examination made by any laboratories of any evidence connected with this case.

9. Any and all photographs or videotapes taken of the defendant.

10. Any and all photographs or videotapes taken at the scene of the crime or otherwise relating to this case.

11. Names and addresses of all witnesses having knowledge of the offense that have been interviewed by the District Attorney, his/her investigators, or the

investigating officers, whether subpoenaed by the District Attorney or not in the above-entitled action.

12. Provide the names and addresses of all witnesses, particularly expert witnesses, who will testify at trial regarding any scientific analysis or tests relating to this case.

13. All written statements of the defendant, victim or witnesses, whether signed or unsigned.

14. Any and all documents in possession of the District Attorney's Office regarding criminal convictions of any potential jurors.

DATED this 5 day of May 2014.

COOK SCHUHMANN & GROSECLOSE, INC.

By: /s/Zane D. Wilson
Zane D. Wilson, #9111108

* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]

Custodian: Weight_Bryce

From: Holladay, Sherese M (LAW)
Sent: Thursday, May 29, 2014 1:25 PM
To: Weight, Bryce L (DPS)
Subject: Arctic Man AK14025280 (Bartlett)

Hey, did you guys have audio while at Arctic Man? I have ALL the Arctic man cases now (I cover Glennallen) and its seems like every one from that weekend is missing audio...
Any chance the above case has a CD somewhere?

Sherese Holladay
Victim Witness Paralegal II
District Attorney's Office
515 E. Dahlia St., Suite 150
Palmer, AK 99645

Phone: [redacted]
Fax: (907) 761-5687
Main Line: (907) 761-5648

Custodian: Weight_Bryce

From: Weight, Bryce L (DPS)
Sent: Friday, May 30, 2014 2:43 PM
To: Holladay, Sherese M (LAW)
Subject: RE: Arctic Man AK14025280 (Bartlett)

Sherese,

I double checked and I have no audio for this incident. The issue at arctic man is situations occur very quickly, and often it is not practical or safe to stop everything and begin recording audio. I know I had two arrests at arctic man, and I did have audio from the other arrest. On this particular incident with Mr. Bartlett things escalated very quickly and I did not have the opportunity to start my audio, prior to having to go hands on and effecting the arrest.

TROOPER BRYCE WEIGHT
Alaska State Troopers – Palmer
453 S. Valley Way
Palmer AK 99645
Desk: [redacted]

From: Holladay, Sherese M (LAW)
Sent: Thursday, May 29, 2014 1:25 PM
To: Weight, Bryce L (DPS)
Subject: Arctic Man AK14025280 (Bartlett)

Hey, did you guys have audio while at Arctic Man? I have ALL the Arctic man cases now (I cover Glennallen) and its seems like every one from that weekend is missing audio...
Any chance the above case has a CD somewhere?

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Main Line: (907) 761-5648

Cook Schuhmann & Groseclose, Inc.

Attorneys at Law
Telephone 907.452.1855 • Facsimile 907.452.8154
• Toll Free 800.550.1855
714 Fourth Avenue, Suite 200 •
Fairbanks, Alaska 99701-4470
www.alaskalaw.com • csg@alaskalaw.com

Barbara L. Schuhmann
Robert B. Groseclose
Jo A. Kuchle
Zane D. Wilson
Craig B. Partyka
Danielle M. Gardner
Mary S. Spiers

July 16, 2014

sender's email address:
zane@alskalaw.com

Via Facsimile

Palmer District Attorney
515 E. Dahlia Avenue, Suite 150
Palmer, AK 99645

Re: State v. Bartlett
Our File No: 5874.01

Dear Mr. Beard:

We understand that there may have been an individual on scene at the time of this incident that took video of the events. Please consider this a formal discovery request for the name, addresses and phone numbers of

any individual who took video of Mr. Bartlett's arrest or the events preceding his arrest.

Your proposed resolution is not acceptable. Mr. Bartlett was assaulted and wrongfully arrested by the troopers involved in this incident.

Thank you for looking into this discovery request.

Sincerely,
COOK SCHUHMANN & GROSECLOSE, INC.

By: /s/Zane D. Wilson
Zane D. Wilson

ZDW/nl
cc: client

Custodian: Weight_ Bryce

From: Holladay, Sherese M (LAW)
Sent: Thursday, July 17, 2014 10:31 AM
To: Weight, Bryce L (DPS); Miner, Joel A (DPS); Nieves, Luis A (DPS)
Subject: AK14025280 (Bartlett) Arctic Man arrest

Hello Sgt and Tprs, with regard to the above case, the defense is insisting there is a video of the contact and arrest. They do not name who, but claim someone, somewhere was videotaping. I know this is a stretch considering what a busy weekend you all must have had, but for the sake of the case, I have to ask, do any of you have any idea if there is a video floating around of the arrest?

Thanks in advance for your time. ☺

Sherese Holladay
Victim Witness Paralegal II
District Attorney's Office
515 E. Dahlia St., Suite 150
Palmer, AK 99645

Phone [redacted]
Fax: (907) 761-5687
Main Line: (907) 761-5648

JA 453

SOA 0453

Custodian: Weight_Bryce

From: Nieves, Luis A (DPS)
Sent: Thursday, July 17, 2014 10:47 AM
To: Holladay, Sherese M (LAW)
Cc: Weight, Bryce L (DPS); Miner, Joel A (DPS)
Subject: Re: AK14025280 (Bartlett) Arctic Man arrest

Channel 2 perhaps. Nothing in our possession or under our control.

Sergeant Luis Nieves
Alaska State Troopers
Recruitment/Background Unit
Toll Free: 877-AKTROOP
Direct: [redacted]
Fax: 907-269-5751
www.alaskastatetrooper.com

Sent from my iPad

On Jul 17, 2014, at 2:31 PM, "Holladay, Sherese M (LAW)" <sherese.holladay@alaska.gov> wrote:

> Hello Sgt and Tprs, with regard to the above case, the defense is insisting there is a video of the contact and arrest. They do not name who, but claim someone, somewhere was videotaping. I know this is a stretch considering what a busy weekend you all must have had, but for the sake of the case, I have to ask, do any of you have any idea if there is a video floating around of the arrest?
>
> Thanks in advance for your time. ☺

Sherese Holladay
Victim Witness Paralegal II
District Attorney's Office
515 E. Dahlia St., Suite 150
Palmer, AK 99645

Phone [redacted]
Fax: (907) 761-5687
Main Line: (907) 761-5648

Document ID: 0.7.1328.5011 ESI0006

Niki L. Lightly

From: Zane Wilson
Sent: Tuesday, August 12, 2014 3:14 PM
To: Beard, Raymond E (LAW)
Cc: Niki L. Lightly
Subject: RE: BARTLETT, Russell (3GL-14-25CR)

Dear Mr. Beard:

I understand the rules, I was simply hoping we could accomplish what needs to be done without the formalities-given that Trooper Weight will be a required witness for the State. I thought my letter made clear that this was as a request that you did not have to honor. We will serve Trooper Weight directly. I see no need for you to quash the subpoena we served on you, I am not making any claim that the service on you is effective for anything.

Are you suggesting that Trooper Weight is lacking access/knowledge to the Trooper policies on the points we have requested? If Trooper Weight is unable to produce and discuss the Trooper policies on these issues I will be happy to get that testimony before the jury and leave it at that.

I will file a motion to compel the discovery we are seeking- per existing case law. That is what it generally takes but I always inquire first as the court prefers that counsel make an effort to resolve these issues before bringing them before the court.

As an FYI, I will be caribou hunting on August 18 (I will have an associate attend in my absence) and moose

hunting form September 5-12. I am not opposed to trying this case as soon as can be scheduled thereafter but it sounds like we have some discovery issues to litigate.

I look forward to meeting you also.

Zane

From: Beard, Raymond E (LAW) [mailto:raymond.beard@alaska.gov]
Sent: Tuesday, August 12, 2014 2:00 PM
To: Zane Wilson
Subject: BARTLETT, Russell (3GL-14-25CR)

Dear Mr. Wilson,

We received in the mail a subpoena for Trooper Weight to appear and produce at the Glennallen courthouse at an unspecified time on August 19, 2014. The District Attorney's Office does not receive service for Alaska State Troopers. Therefore, we are returning that subpoena to you by U.S. Mail. Please note that service of subpoenas in a criminal case is governed by Criminal Rule 17(d).

As a suggestion, you may be able to obtain the policy information you seek directly from the Alaska Department of Public Safety rather through an individual trooper who may not possess such information. I also believe, but I am not sure, that a defendant seeking such production is required to motion the court for a hearing to address the issue. I will therefore ask the court to quash this current subpoena.

You also asked in the letter which accompanied the subpoena whether the State intended to respond to your outstanding discovery request. Discovery in a criminal case is handled in a rather perfunctory manner under Criminal Rule 16 – the State provides the defendant with all required discovery without request. That was performed on May 21, 2014 when the State sent you six pages. Those same six pages were sent to you again on June 17, 2014. We have no physical evidence in our possession.

We asked Trooper Weight if there is any audio. He indicated that there is not. I do not know whether some private person videotaped the incident. I would certainly want to view any such video if it exists, and the State would provide that evidence to you if it were in our possession, but is not. If you are able to locate such a recording, I would greatly appreciate the opportunity to inspect and copy.

I'm planning to be In Glennallen for calendar call on August 18. I look forward to seeing you there.

Sincerely,
Ray Beard

Raymond Beard
Assistant District Attorney
Palmer District Attorney's Office
T (907) 761-5648
F (907) 761-5687

Niki L. Lightly

From: Zane Wilson
Sent: Thursday, October 02, 2014 8:38 AM
To: Russ B
Cc: Niki L. Lightly
Subject: RE: Russell Bartlett..Video of me getting arrested at Arctic Man

Hello Russ:

What I see looks favorable to you. I would like to get the rest of it. Do you have contact information?

Zane

From: Russ B [mailto:colt451911acp@gmail.com]
Sent: Wednesday, October 01, 2014 8:07 PM
To: Zane Wilson
Subject: Russell Bartlett..Video of me getting arrested at Arctic Man

Hi Zane,
Here is a you tube video of me getting arrested at arctic man.

http://youtu.be/PiyXomUflu4?list=UUZuSGyayb9fJZ5MdLCRwhQg

At 1:55 seconds is Sgt Nieves right before he came in contact with me the first time after he got done talking to the people in the motor home and then came up to me and ask too talk to me then at 2:04 is where trooper Weight assaults me and the he and Sgt Nieves take me down then after that is when they but me into the

trooper vehicle. This video is from a John Thain from new station KTVA 11. Sgt Nieves i believe has a mic on him from the new station and there should be alot more footage and audio. I believe they should even have Sgt Nieves and my first encounter. Please let me know what you think.

Thank you
RussBartlett

FW: BARTLETT, Russell (3GL-14-25, AK 14025280) https://webmaila.alaska.gov/owa/?ae=Item&t=IPM.Note&id=RgAAA ... 5/11/2015 9:37 AM

FW: BARTLETT, Russell (3GL-14-25, AK 14025280)
Beard, Raymond E (LAW)
Sent: Friday, May 08, 2015 2:41 PM
To: Galbraith, Stephanie D (LAW)

From: Beard, Raymond E (LAW)
Sent: Monday, December 01, 2014 2:12 PM
To: Nieves, Luis A (DPS)
Subject: RE: BARTLETT, Russell (3GL-14-25, AK 14025280)

I watched the video clip that is on KTVA's website. I don't like the editing of it. I would like to get the original footage.

From: Nieves, Luis A (DPS)
Sent: Monday, December 01, 2014 1:17 PM
To: Beard, Raymond E (LAW)
Cc: Despain, Timothy J (DPS); Peters, Megan A (DPS)
Subject: RE: BARTLETT, Russell (3GL-14-25, AK 14025280)

Ray,

The reporter in this case was also the camera man. He was standing next to or near me throughout my entire

contact at this camp site. https://www.youtube.com/watch?v=PiyXomUflu4

I am working on getting contact info from our PIO now.

Let's just issue him a subpoena to appear.

Lu

Sergeant Luis Nieves
Alaska State Troopers
Recruitment/Background Unit
Toll Free: 877-AKTROOP
Fax: 907-269-5751
JOIN THE STATE TROOPERS
Like Us On **facebook**
twitter

From: Beard, Raymond E (LAW)
Sent: Monday, December 01, 2014 1:11 PM
To: Nieves, Luis A (DPS)
Subject: RE: BARTLETT, Russell (3GL-14-25, AK 14025280)

Thank you. I viewed the video on their website. Do you think we can obtain the uncut footage of the incident, and the contact info of the film crew?

SOA 0411

FW: BARTLETT, Russell (3GL-14-25, AK 14025280) https://webmaila.alaska.gov/owa/?ae=Item&t=IPM.Note&id=RgAAA ... 5/11/2015 9:44 AM

FW: BARTLETT, Russell (3GL-14-25, AK 14025280)
Beard, Raymond E (LAW)
Sent: Friday, May 08, 2015 2:49 PM
To: Galbraith, Stephanie D (LAW)

From: Weight, Bryce L (DPS)
Sent: Friday, December 05, 2014 6:43 PM
To: Beard, Raymond E (LAW); Nieves, Luis A (DPS); Miner, Joel A (DPS)
Subject: RE: BARTLETT, Russell (3GL-14-25, AK 14025280)

Raymond,
That particular juvenile had not been drinking. After Bartlett had been secured in a vehicle, I returned and spoke with the juvenile. He was .000 on a PBT. I don't recall identifying him, as he was not being cited for anything. The juvenile was very polite and respectful. I do remember talking with him and a friend of his. They told me they did not know Bartlett.

Trp. Weight

From: Beard, Raymond E (LAW)
Sent: Friday, December 05, 2014 4:44 PM
To: Weight, Bryce L (DPS); Nieves, Luis A (DPS); Miner, Joel A (DPS)

Subject: BARTLETT, Russell (3GL-14-25, AK 14025280)

Troopers,

I spoke today with Bartlett's attorney, Zane Wilson. He claims that the young man that Trp. Weight was talking to was under Bartlett's watch and that's why Bartlett approached Trp. Weight. Did anyone identify that young man? Was he cited for MCA?

Wilson says that he will bring that young man in to testify. I want to make sure he doesn't slip in some imposter.

That also raises the question of whether Bartlett was allowing this minor to drink or if he was contributing to his delinquency.

I'm also working with the cameraman to see if he can enhance the video.

Thanks,
Ray

Raymond Beard
Assistant District Attorney
Palmer District Attorney's Office
T (907) 761-5648
F (907) 761-5687

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. 4:15-cv-00004-SLG

[Filed March 31, 2016]

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
v.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Defendants.	)

REPLY TO OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Russell Bartlett opposes Trooper Bryce Weight's and Sgt. Luis Nieves' motion for summary judgment arguing that a jury might agree with Bartlett's wild speculation about the troopers' alleged subjective motivations for arresting him, while conceding the objective historical facts that support summary judgment. But the troopers' law enforcement actions did not violate Bartlett's constitutional rights. And Bartlett makes almost no attempt to show that the

troopers violated clearly established law. When plaintiff does not meet this burden, the defendant is entitled to summary judgment.[1]

In short, by any objective standard, a reasonable officer would have known that Bartlett's proximity to the lone trooper limited Trooper Weight's ability to react to a potential threat. A reasonable officer from Trooper Weight's perspective could believe that probable cause existed to arrest Bartlett for disorderly conduct, harassment, and assault. And a reasonable officer in Sgt. Nieves' shoes, aware of the totality of circumstances, could – and likely would – believe that Bartlett was engaged in harassment, disorderly conduct, or assault. Even if this Court determines that the troopers' judgments were mistaken, Trooper Weight and Sgt. Nieves are still entitled to qualified immunity: In light of clearly established existing law, and given the information they had, a reasonable officer could have believed that probable cause existed to arrest Bartlett, and that it was reasonable to use a single push to move Bartlett back to then use minimal force to safely arrest him. Summary judgment should be granted.

UNDISPUTED FACTS

Other than disagree with the troopers' subjective belief that Bartlett's demeanor was "aggressive" and "hostile," Bartlett does not dispute the 14 material, pre-

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[1] *Reynolds v. County of San Diego*, 84 F.3d 1162, 1167 (9th Cir. 1996). *See also Galvan v. Carothers*, 855 F. Supp. 285, 293 (D. Alaska 1994) (plaintiff's failure to demonstrate that the right allegedly violated was clearly established is itself grounds for entering summary judgment for defendants).

arrest facts listed in defendants' memorandum. To recap, Bartlett does not dispute that he approached Trooper Weight while he was in the midst of an investigation. Bartlett does not dispute that he stopped within arm's reach of the trooper and that he interfered in the investigation. Bartlett's quibble that Bartlett's chest was not almost touching Trooper Weight's does not negate the fact that he was very close to Trooper Weight. Bartlett cannot dispute that a person who is drinking alcohol may be unpredictable or that a person's close proximity reduces the officer's ability to respond to any potential threat that person may pose. Bartlett argues that the loud music gave him carte blanche to close in on Trooper Weight in order to be heard. Not so. The loud music only increases the uncertainty. Indeed, the 15-year-old described Bartlett as being "scary" loud, even implying that conduct alone justified the arrest.[2]

Bartlett does not dispute that as Sgt. Nieves began to leave the party area he saw Bartlett head toward Trooper Weight, who was some distance from Bartlett, although Bartlett had just advised Sgt. Nieves that he did not want to speak with him. Sgt. Nieves then rushed to Trooper Weight to provide assistance. And it remains undisputed that as Sgt. Nieves approached, he heard Trooper Weight order Bartlett back and saw Trooper Weight push Bartlett back. Whether or not Bartlett was "highly" intoxicated adds to the uncertainty and risk. People under the influence "often

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[2] Exc. P, [Tr. 26:9-11].

act in unpredictable, irrational" ways.[3] Bartlett's statements regarding his purported intent and his relationship with the teen are not material and were not known to the troopers.[4]

Focus on what occurred at the RV before Bartlett's arrest is misplaced. The germane facts about that are limited: Sgt. Nieves was investigating minors consuming, while he was directing that a beer keg be moved inside the RV: he had close contact with Bartlett; Bartlett possessed alcohol, and – according to Bartlett – Bartlett did not want to speak with the uniformed trooper – as is his right. Bartlett was not detained or arrested and Sgt. Nieves left the area. Virtually everything else that occurred near the RV door is disputed and not material.[5] Likewise, the post-

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[3] *Luchtel v. Hageman*, 623 F.3d 975, 982 (9th Cir. 2010)(recognizing that a size disparity does not create material fact dispute because people under the influence of mood-altering substances often act unpredictably).

[4] Bartlett had no guardian responsibilities for the teen. Ex. Y, [Tr. 37: 12-14].

[5] If 25 more unreliable narrators said that Bartlett did not yell by the RV, for example, that does not reach a level of genuine dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U. S. 242, 248 (1986). The teen testified that that there was "definitely a lot of alcohol" and that drug use at the RV was so prevalent that when the RV door opened it "filled the entire outside with the smell of marijuana." Ex. P, [Tr. 10:4-7]. KTVA reporter, John Thain, left the area of the RV to film other matters such as "the moon," "the D.J.," and the "fireworks." Ex. Q, [Tr. 27:5-17].

arrest disputes are not material insofar as Bartlett argues they support his theories of subjective intent.[6]

ARGUMENT

I. Interference is coercive and a factor in harassment and disorderly conduct.

Bartlett argues that his interference in the investigation is not a crime.[7] The statutes Bartlett cites may apply. But even if they do not apply, AS 11.41.530(a)(4), which criminalizes coercion, does apply. "A person commits the crime of coercion if the person compels another . . . to abstain from conduct in which there is a legal right to engage by means of instilling in the person who is compelled a fear that if the demand is not complied with, the person who makes the demand . . . may . . . cause a public servant to take or withhold action." Bartlett – through his conduct and words – compelled Trooper Weight to abstain from his investigation by instilling in Trooper Weight a fear that if Bartlett's demands were not met, Bartlett would continue to physically impede the investigation and further endanger Trooper Weight and possibly the teen bystander. Thus, a reasonable officer could believe that probable cause existed to charge Bartlett with violation of AS 11.41.530(a)(4).[8]

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[6] Sgt. Nieves never said "bet you wish you would have talked with me." Audio captured the referenced conversation during crowd control. Ex. R. An informal transcript is provided. Ex. S.

[7] Dkt. 57 at 17 – 19.

[8] Cf., *Crumley v. City of St. Paul*, 324 F.3d 1003, 1005 (8th Cir. 2003)(recognizing state court found probable cause existed to

Bartlett misses a key point, however, regarding his interference. It is his burden to show that clearly established law prohibits troopers from considering a person's direct interference in an investigation as a factor in determining probable cause for harassment and disorderly-conduct related charges. Bartlett fails to cite a single case on this. In contrast, the troopers cite several cases, including *Biddle v. Martin*[9], *Locricchio v. Richards*,[10] and *Jackson v. City of Bremerton*,[11] which show that interference is a routine and compelling factor in such charges. Bartlett relegates discussion of the defense cases to footnote 113 of the opposition, incorrectly arguing that this court must only consider the "clearly established laws of Alaska." In doing so, Bartlett ignores that the *Locricchio* court granted qualified immunity for a harassment charge for an individual's interference with an officer's duties in close proximity.[12] *Locricchio's* facts are not only remarkably similar to Bartlett's case, but the germane part of Hawaii's harassment statute is virtually identical to

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charge attorney with obstruction of legal process for interfering with arrest).

[9] 992 F.2d 673, 674 (7th Cir. 1993).

[10] 1996 WL 478703 *3 (C.A. Aug. 22, 1996).

[11] 68 F.3d 646, 652 (9th Cir. 2001).

[12] Bartlett cites several inapposite cases in footnote 137 that involve lethal or near lethal use of force by police. *Young v. County of Los Angeles*, 655 F.3d 1156 (9th Cir. 2011), for example and was not about a false arrest. *Young* addressed whether excessive force was used when a police officer struck a black man with a baton at a traffic stop.

AS 11.61.120(a)(1). Defendants have thus met their burden to show their entitlement to qualified immunity because probable cause existed to arrest Bartlett for harassment; Bartlett abdicates his burden. Dismissal of this case is warranted on this basis alone.[13]

Ignoring the harassment issue, Bartlett relies primarily on the Alaska case *Crawford v. Kemp* to support his argument. Bartlett is mistaken. Instead, *Crawford* compels the grant of qualified immunity here for two key reasons: (1) the *Crawford* court's emphasis on "approach" and "dominance" are consistent with the troopers' cited cases; and (2) the trial court's correct application of federal law resulted in qualified immunity, while the Alaska Supreme Court's incorrect application reversed, resulting in state law that is not clearly established even on *Crawford*-like facts.

Crawford v. Kemp is relevant only in a broad general sense because it addresses Alaska's disorderly conduct statute in the context of a state trooper's contact with an individual seated in the court clerk's office.[14] After the trooper approached Crawford and asked him for information, Crawford became loud and vocal and the trooper feared that Crawford and his cohort would join together. This led to Crawford's arrest for disorderly conduct in violation of AS 11.61.110(a)(1) and (6).[15] Because the court found the

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[13] *Reynolds v. County of San Diego*, 84 F.3d 1162, 1167 (9th Cir. 1996).

[14] *Id.* at 1251.

[15] *Id.* at 1252.

trooper approached Crawford and was in the "physically dominant position," it found fact questions existed regarding whether Crawford was creating a hazardous condition for others under AS 11.61.110(a)(6) and whether Crawford was unreasonably loud under AS 11.61.110(a)(1).[16]

Bartlett ignores that the *Crawford* court failed to analyze the second prong of qualified immunity. Simply put, the *Crawford* decision failed to follow federal law.[17] *Crawford* was decided in 2006 and relies on the state case law that also incorrectly analyzed qualified immunity.[18] In 2008, two years after the *Crawford* decision, the Alaska Supreme Court clarified that its prior qualified immunity analysis lacked an element required by federal law:

> *Saucier* overturned the Ninth Circuit's decision in *Katz*, a decision which *Samaniego* cited twice in its discussion of qualified immunity. What *Katz* denied, and *Saucier* asserted, was that an officer's mistaken but reasonable belief about the legality of his actions could secure that officer qualified immunity. The problem with *Katz* was that it turned the qualified immunity analysis solely into the question of whether the actions of an officer were "objectively reasonable." It did not allow

---

[16] *Id.*

[17] *Crawford v. Kemp*, 139 P.3d at 1249.

[18] *Crawford* , 139 P.2d at 1252 n. 2, 1255 n. 8, 1256 (Alaska 2006)(citing *Samaniego v. City of Kodiak*, 2 P.3d 78, 82 – 85 (Alaska 2000).

> the possibility that an officer might act in a way that was objectively reasonable and still be immune from suit because he reasonably but mistakenly believe that his actions were lawful.[19]

In sum, *Crawford v. Kemp* applied Alaska law that relied on the Ninth Circuit's erroneous qualified immunity analysis that was reversed by *Saucier v. Katz*. Under *Saucier v. Katz*, a "further dimension" is required, the point of which is to acknowledge that reasonable mistakes can be made regarding the legal constraints on alleged misconduct.[20] Because *Crawford v. Kemp* failed to apply the core of the federal qualified immunity analysis, *Crawford* is unreliable on the ultimate question of qualified immunity.[21]

The trial court, following federal law, granted qualified immunity to the trooper in the clerk's office consistent with defendants' cited cases.[22] The trooper "transgressed no bright lines."[23] Crawford's level of noise interfered with the work of the clerk's office[24] –

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[19] *Sheldon v. City of Ambler*, 178 P.3d 459, 464 (2008)(*Samaniego* "muddied" the law of qualified immunity and "goes against the holding in *Saucier*.)" *Id.* at 465.

[20] *Saucier v. Katz*, 121 S. Ct. 2151, 2158 (2001).

[21] *Crawford* does not address the conduct under Alaska's harassment statute.

[22] Ex. T.

[23] *Id.* at 16.

[24] *Id.* at 17-18.

like Bartlett's level of noise and conduct interfered with Trooper Weight's work – and the court recognized that not all forms of speech are protected in certain contexts.[25]

In *Crawford*, the trooper feared that Crawford and his cohort might become violent and charged him with disorderly conduct under AS 11.61.110(a)(6). Here, Bartlett approached Trooper Weight and Trooper Weight was never in a dominant position. Bartlett was not seated and he was intoxicated. At a minimum, state law is unsettled on a trooper's entitlement to qualified immunity for a disorderly conduct arrest on *Crawford* like facts and is thus even more unsettled on Bartlett's dissimilar facts. When courts are divided on whether a constitutional right has been violated in a given situation, this signifies that the right is not clearly established.[26] We cannot reasonably expect police officers confronted dangerously close by loud drunk to do better because "we cannot realistically expect that reasonable police officers know more than reasonable judges about the law."[27] Echoing this, the Supreme Court stated that "if judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the

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[25] *Id.* at 20. Sadler's testimony indicates that someone at the party exercised his right to verbally taunt troopers from a safe distance. Sadler assumed that person was Bartlett until Bartlett's counsel corrected him by telling him that person dancing and giving "two middle fingers" was not Bartlett. Ex. U, [Tr. 50:23 – 53:18].

[26] *Wilson v. Layne*, 526 U.S. 603, 618, 119 S. Ct. 1692, 1701 (1999).

[27] *Barts v. Joyner*, 865 F.2d 1187, 1193 (11th Cir. 1989).

controversy."[28] Trooper Weight and Sgt. Nieves are entitled to qualified immunity.

II. Bartlett shows no bright line precluding probable cause for resisting arrest.

To arrest Bartlett, Sgt. Nieves took his left arm, while repeatedly ordering Bartlett to get back and to get down. Based on Bartlett's resistance to the arrest, he was charged with a violation of AS 11.56.700(a)(1). Arguments made in earlier briefing on the resisting arrest issue are incorporated here. The law does not require that a person must be told that he is "under arrest" to satisfy the elements of the statute. Nor would such an express requirement comport with public safety; specific commands such as "put your hands back," "get back," and "get down" give clear directions in a rapidly evolving situation, while a vague statement provides no direction. Troopers' commands to Bartlett combined with taking his arms is a Fourth Amendment seizure that effectively alerted Bartlett that he was under arrest.

When Sgt. Nieves first took Bartlett's left arm, the video shows that Bartlett attempted to yank it from Sgt. Nieves's grasp, while yelling and snarling at Sgt. Nieves. Bartlett's combative stance is depicted in a video frame.[29] As Bartlett actively threatened Sgt. Nieves, Bartlett's right arm was unsecured and

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[28] *Pearson*, 129 S. Ct. at 823; (*see also, Hope v. Pelzer*, 536 U.S. 730, 739 (2002)(finding that where reasonable jurists dispute whether conduct violates the Fourth Amendment, it is difficult to say that a defendant's actions were so clearly contrary to established law).

[29] Dkt. 47-15.

swinging, and the video shows his right hand clenching.[30] A reasonable officer in Sgt. Nieves' shoes could and would fear for his safety. The enhanced video shows Sgt. Nieves defensively move behind Bartlett to avoid being hit. The video shows similar resistance when Trooper Weight took Bartlett's right arm.[31] Thus, Bartlett's arrest swiftly ripened into a situation where Bartlett's resistance throughout posed a threat to both troopers. Bartlett's lack of cooperation, combative stance, his left arm yank, and his swinging right arm parallel the facts in *Fallon* (involving the suspect who pushed away from the vehicle, causing the trooper to believe that Fallon was about to assault him) and *Velarde* (involving a "struggle").[32] Bartlett's sweeping arm and body movements further distinguish his case from *Eide v. State* ("turtling")[33] and *Bultron v. State* (hands held rigid in front).[34] Bartlett cites no case

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[30] Ex. V, [Tr. 130:14-17, 131:4-15, 137:7-18].

[31] Ex. V, [Tr. 137:15-21].

[32] *Fallon v. State*, 221 P.3d 1016, Alaska App. 2010. 353 F.3d 355, 356 (Alaska App. 2015).

[33] 168 P.3d 499 (Alaska App. 2007).

[34] 2011 WL 5627897 (Alaska App. 2004). This unpublished decision was not cited by Bartlett in his motion for summary judgment, nor is it cited in the annotations to AS 11.56.700. Troopers on the scene cannot be expected to carry Westlaw in their pockets. *Bultron* and *Eide* involve convictions and have little relevance to the issue of probable cause. Indeed, *Bultron* recognizes that under the statute "one might say that Bultron engaged in 'bodily impact' when he resisted the officers' efforts to arrest him," further explaining that Alaska's standard for a resisting arrest conviction turns on force directed at the officers. But common sense is part of

involving a suspect who aggressively confronts the arresting officer but the court thereafter construes the remaining struggle as "passive." Absent binding, closely corresponding legal precedent, a court should not find that a right is clearly established.[35]

Qualified immunity also requires that the court give breathing room to officers to make reasonable but mistaken judgments about the law and the facts. If troopers were mistaken that Bartlett was combative and threatening at the outset of the arrest and throughout, that mistake is reasonable. Bartlett approached Trooper Weight to insert himself into the trooper's investigation. Bartlett was loud. And he stood in very close proximity. Sgt. Nieves had just witnessed Trooper Weight defensively push Bartlett back suggesting Bartlett had threatened the trooper. Bartlett's body was turning and he flailed his right arm with a clenched fist, causing the troopers to scramble and thereafter apply significant downward pressure.

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the probable cause analysis and when an officer experiences bodily impact and resisting force, the law does not require that he draw inferences in favor of the suspect. Probable cause to arrest for such conduct is thus wholly compatible with the Fourth Amendment's reasonableness standard – even if the officer is mistaken about the exact force used or the threat posed. This common sense approach is recognized by the Supreme Court: "Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of relevant law. The officer may be reasonably mistaken on either ground. . . . . The Fourth Amendment tolerates reasonable mistakes. *Helen v. North Carolina*, 135 S. Ct. 530, 536, 539 (2014), noting that the distinct qualified immunity inquiry is even more "forgiving" of mistakes. *Id.* at 539.

[35] *Brosseau v. Hogen*, 543 U.S. 194, 199-201, 125 S. Ct. 596, 599-600 (2004).

Ninth Circuit law requires allowance for uncertainties involving people under the influence who may act unpredictably and irrationally.[36] Reasonable officers would necessarily be concerned for their own safety in the close hands-on situation precipitated by Bartlett's conduct.

In sum, Bartlett fails to show a clear bright line that precludes probable cause to charge him for resisting arrest. Moreover, the same conduct supports related charges of disorderly conduct, harassment, and even assault. In a related Alaska case, a prosecutor substituted a disorderly conduct charge for a resisting charge against a female arrested for DUI who swung her arm from troopers during an arrest – conduct very similar to Bartlett's.[37] The troopers here are entitled to qualified immunity.

III. Trooper Weight's single push did not violate the constitution.

Bartlett argues that the enhanced video "establishes" that Trooper Weight's push was "precipitated" by Sgt. Nieves' arrival.[38] Although not apparent on the original KTVA video, the enhanced version shows Trooper Weight's head turns slightly to the right as Sgt. Nieves approaches. Trooper Weight does not recall knowing that Sgt. Nieves was in the

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[36] *See* Note 3, *supra*.

[37] Dkt. 47-14.

[38] Dkt. 57 at 8.

area until Sgt. Nieves took Bartlett's arm.[39] Bartlett lacks foundation to conclude that the video "establishes" what Trooper Weight saw or perceived, particularly given that the teen may have blocked his view and the video shows that Trooper Weight's primary focus was Bartlett. And about the same time, the video shows that Trooper Weight reacted when, as ADA Beard describes it, "Bartlett makes a shift of his shoulder towards Trooper Weight."[40]

Whether Trooper Weight subconsciously recognized Sgt. Nieves was approaching is not material. Bartlett fails to cite even a single case that holds that a police officer's open-palmed push violates the constitution, and, once again, Bartlett fails to address defendants' cases. Indeed, *Portillo v. Montoya* involved two officers against one Bartlett-like threat. The court found that the use of a single push and flashlight strikes to effect the arrest was reasonable under *step one* of the qualified immunity analysis. Here, no strikes occurred and this case is not even a close call. Bartlett's force claim against Trooper Weight for the single push is wholly meritless.

Whether Bartlett's right hand was up toward Trooper Weight before he was moved back is not material to harassment or disorderly conduct charges and Bartlett cites no clearly established law that says

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[39] Ex. W, [Tr. 20:17-21:3].

[40] Ex. V, [Tr. 149:14-17].

otherwise. Moreover, Bartlett is not credible here.[41] Bartlett's right hand was free and within striking distance of Trooper Weight. Bartlett showed no signs of retreat. His head is tilted forward and nothing about his stance demonstrates a casual presence. The video, of course, cannot convey the odor of alcohol, and it does not clearly show Bartlett's eyes and facial expressions. As Assistant District Attorney Beard explains, sufficient probable cause exists for disorderly conduct based on the hazardous condition Bartlett created, without regard to the exact position of Bartlett's right hand.[42]

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[41] The enhanced video shows Bartlett's right hand was up before he was pushed. Ex. X. Frame 35 shows the tip of Bartlett's glove or its reflector, then Bartlett's right hand is seen, while showing virtually no precipitating backward movement of Bartlett's torso, neck or head. The beer in his lowered left hand is consistent with a recent transfer of the beer from his dominant right hand to free it up. Mr. Krack's white coat is visible in the enhanced video off to Trp Weight's left side and shows that Mr. Krack had a clear view of Bartlett's right hand. Krack testified that Bartlett's hand was up, pointing. Trp Weight wrote in his report that Bartlett was "combative" consistent with his April 15, 2014, use-of-force report that states "[Bartlett] put his hands very close to my face, pointing." Krack and Trp Weight do not equivocate on this, but Bartlett does. At his deposition Bartlett said "I don't recall exactly where my right hand was, but it was probably right here on my side." Ex. Y, [Tr. 82:4-5]. After stating he didn't recall, Bartlett requested a break and his counsel spoke to him. Immediately after the break, Bartlett sought to "revisit" his answer and said his "right hand did raise up after the fact" in reference to Trp Weight's push. Ex. Y, [Tr. 83:1-12].

[42] Ex. V, [Tr. 51:18-54:11 and 152:8-23].

Bartlett argues Trooper Weight should have attempted "further communication" with Bartlett, ordered Bartlett to leave, or taken a step back."[43] Again, Bartlett cites no case that requires these alternatives in the context of the minimal force used here, which is not expected to – and did not – cause any injury.[44] Moreover, Trooper Weight found that communicating with Bartlett was futile. Nothing requires an officer to blindly step backwards in a loud alcohol-fueled environment. And a trooper would be remiss to step back and leave a teen bystander exposed to a potential threat. In fact, the entire situation was created by Bartlett's own conduct and culpability.[45]

IV. Bartlett cites no case that precludes the force safely used to arrest him.

To arrest Bartlett the troopers each took an arm and repeatedly instructed Bartlett to get back and to get down. They worked together to accomplish a controlled take down, the goal of which is to quickly gain control of an individual who poses a threat. The goal was accomplished; no one was injured. Defendants cite multiple cases that establish their use of a controlled takedown was well within constitutional bounds. Once again, Bartlett wholly ignores these cases. Instead, Bartlett relies primarily on

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[43] Dkt. 57 at 35.

[44] *See Reed v. Hoy*, 909 F.2d 324, 330-31 (9th Cir. 1990) (no duty to retreat).

[45] *See e.g., Scott v. Harris*, 550 U.S. 372, 384 (2007)(recognizing culpability of defendant in creating situation where innocent bystanders are at risk of being hurt).

Blankenhorn v. City of Orange,[46] which has no application here. In *Blankenhorn*, officers contacted a mall trespasser who alleged that at least three of them "all jumped on [him]."[47] The court refers to this three-officer jump in which the officers violently threw themselves on the suspect as "gang tackle."[48] A video showed the one officer placed a knee behind the suspect's neck and another punched him multiple times in the body and once in the head.

The distinctions between *Blankenhorn* and this case are obvious. Three officers did not "gang tackle" Bartlett without warning; two troopers repeatedly ordered Bartlett to get back and get down and then – using a controlled takedown – took Bartlett gradually to the ground. Multiple punches were thrown in *Blankenhorn*; no one punched Bartlett. An officer placed a knee behind Blakenhorn's neck; although the video shows that Trooper Weight struggled to control Bartlett, he did not use his knee. Nothing in *Blankenhorn* indicated that the suspect was under the influence of drugs or alcohol; Bartlett had been drinking beer all night. *Blankenhorn* is thus neither analogous nor apt. In fact, Ninth Circuit precedent establishes that a controlled takedown is "clearly lawful."[49]

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[46] Dkt. 57 at 33 – 35.

[47] *Blakenhorn v. City of Orange*, 485 F.3d 463, 469 (9th Cir. 2007).

[48] *Id.* at 479 – 80.

[49] *See*, e.g., *Sheridan v. Trickey*, 2010 WL 5812678 (D. Oregon 2010).

Bartlett also ignores controlling Ninth Circuit law that precludes an excessive force claim based on tight handcuffs where the arrestee fails to report discomfort to the arresting officers and summary judgment is appropriate on that claim.

V. Bartlett's malicious prosecution claims also fail in their entirety.

Consistent with his astounding disregard for controlling authority, Bartlett's claims do not meet the elements of a §1983 Fourth Amendment malicious prosecution claim for four key reasons: (1) probable cause is a complete defense, (2) qualified immunity is a complete defense, (3) dismissal of the criminal case for budget reasons is not a favorable termination;[50] and (4) *Karam v. City of Burbank*,[51] forecloses a Fourth Amendment claim because Bartlett was released from Arctic Man on routine bail conditions. Summary judgment should be granted on this claim.

In the context of a §1983 suit against police officers, official conduct violates the substantive component of the Fourteenth Amendment due process clause "only when [it] 'shocks the conscience.'"[52] It is patently

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[50] *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1068 (9th Cir. 2004); *Logan v. Caterpillar*, 246 F.3d 912, 925-926 (7th Cir. 2001)(holding that dismissal by nolle prosequi order does not establish that a criminal prosecution terminated in a way indicative of plaintiff's innocence).

[51] 352 F.3d 1188, 1193 (9th Cir. 2003).

[52] *Tatum v. Moody*, 768 F.3d 806, 820 – 821 (9th Cir. 2014), citing *Gantt v. City of Los Angeles*, 717 F.3d 702 (9th Cir. 2013); *see also, County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998).

obvious that the Fourteenth Amendment does not apply here, particularly where a Fourth Amendment claim is foreclosed. The arrest of Bartlett was routine, the troopers exercised restraint, and no one was injured. The reports are remarkably accurate given how quickly Bartlett's arrest occurred and given the remote Arctic Man location with its limitations and distractions. Bartlett primarily focuses on a few phrases the troopers used in their reports to describe the conduct they perceived during his arrest. In doing so, he ignores well-established law. First, independent probable cause exists even if the disputed descriptions are not considered.[53] Second, *Tatum v. Moody* narrowly construes the due process claims and expressly forecloses a claim here because no lengthy incarceration occurred. The claims in *Tatum* involved highly exculpatory evidence and material "false assertions" in police reports.[54] Third, Ninth Circuit law forecloses a due process claim where, as here, the criminal charges were dismissed.[55]

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[53] Ex. V, [Tr. 51:18-52:21]. *Curtis v. Riley*, 2012 WL 4882318, *8 (W.D. Washington) analyzing a *Devereaux* claim and citing *Tomer v. Gates*, 118 F.2d 1240, 1242 (9th Cir. 1987) (when independent reasons for probable cause exist to support an arrest, "then the most that can be said of the provision of false evidence is that 'it had the potential to but did not, impinge on plaintiffs' constitutionally protected rights.'").

[54] *Tatum*, 768 F. 3d at 809(reports falsely stated that signature robberies stopped after suspect was arrested). Bartlett had equal ability to search the internet for the video and to contact the local news. He contacted Natl. Geographic instead. Dkt. 57-6.

[55] *Pucetti v. Spencer*, 476 Fed. Appx. 658, 660-661(9th Cir. 2011).

Bartlett's attempt to base a claim on *Devereaux* also fails. There is simply no evidence that shows (1) defendants continued their investigation of Bartlett despite the fact they knew or should have known that Bartlett was innocent, or (2) that they used coercive investigation techniques.[56] Defendants did not investigate after Bartlett was arrested (they merely responded to requests from Mr. Beard's office). Neither defendant believed Bartlett was innocent.[57] Nor do ADA Beard or Lt. Piscoya believe that Bartlett is innocent based on their view of the record, including the reports and the KTVA video. Indeed Lt. Piscoya believes that Bartlett's conduct was "aggressive and disorderly."[58] Bartlett does not allege that coercive investigative techniques were used. Bartlett's due process claim is wholly meritless and should be summarily dismissed.

VI. Bartlett fails to rebut the prosecutor's independence.

ADA Beard assumed responsibility for Bartlett's prosecution and the troopers fully cooperated with him and his office.[59] Mr. Beard asserts that he exercised independent judgment and was not pressured or

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[56] *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2011).

[57] *Gausivik v. Perez*, 345 F.3d 813, 817 – 818 (9th Cir. 2003)(holding that even if officer's affidavit for probable cause supporting arrest contained incorrect facts, no evidence existed that officer knew that arrestee was innocent).

[58] Ex. Z, [Tr. 75:23-24, 81:1-3].

[59] Ex. V, [Tr. 178:1-11].

coerced by the troopers.[60] Bartlett's claim that Mr. Beard was not independent because a jury could view the evidence differently based on Bartlett's version of the arrest fails, as a matter of law, to rebut the presumption of independence.[61] Nor has Bartlett established that troopers withheld any material or critical information from Mr. Beard. Mr. Beard reiterated that if budget issues had not prevented it, he would have taken Bartlett's case to trial.[62]

At the outset Mr. Beard reviewed the criminal complaint and Trooper Weight's affidavit, and he likely looked for any past criminal history.[63] He viewed the case as a routine Arctic Man drunk and disorderly conduct case.[64] Mr. Beard believed that paragraph 2 of the complaint justified a charge of disorderly conduct. And he considered the possibility of an additional fear assault charge based on paragraph 3.[65] Mr. Beard's contacts were Troopers Miner and Weight and Sgt. Nieves.[66] Mr. Beard spoke with all of them including Trooper Miner, who confirmed that he was working with Trooper Weight investigating teens possessing

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[60] Ex. V, [Tr. 178:12-22].

[61] *Newman v. County of Orange*, 457 F.3d 991, 995 (9th Cir. 2006).

[62] Ex. V, [Tr. 178:23 – 179:1].

[63] Ex. V, [Tr. 17:5-10].

[64] Ex. V, [Tr. 58:20-25].

[65] Ex. V, [Tr. 53:13-54:11].

[66] Ex. V, [Tr. 178:4-8].

and consuming alcohol.[67] Mr. Beard explained that not all details of the reports are necessarily material.[68] Mr. Beard indicates that he has audio/video evidence in only about half of his cases, and Arctic Man is an event that frequently has no recordings.[69] Mr. Beard tendered an initial offer to Bartlett that included a "charge bargain."[70] Early in the case, after receiving a request from Bartlett's counsel about possible video, the DA's paralegal emailed the three troopers and Trooper Miner and Sgt. Nieves responded that a local television station may have something, both copying Trooper Weight.[71] Mr. Beard was responsible for deciding whether and when to follow up on that information.[72] Mr. Beard explained that Bartlett's case had lower priority because it was on a trial calendar that only

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[67] Ex. V, [Tr. 95:14-96:3].

[68] Ex. V, [Tr. 134:17-24; 153:14-22; 154:22 – 155:20; 156:7 – 157:13].

[69] Ex. V, [Tr. 22:12-17; 42:3-44:9; 20:3-23].

[70] Ex. V, [Tr. 15:17-22].

[71] Ex. V, [Tr. 181]. File may not have all notes. Ex. V, [Tr. 89:20 – 90:23]. ADA Beard not misled by reports that don't reference private video. Ex. V, [Tr. 18:18 – 30:25].

[72] Ex. V, [Tr. 182:14-21]. Efficiency discussed at Ex. V, [Tr. 29:7-14].

comes up every two months.[73] Bartlett sought continuances that took the case well into October.[74]

Mr. Beard found Bartlett's claim that Trooper Weight assaulted him to be surprising and "frivolous."[75] Bartlett pursued his assault theory by filing various motions and submitted an affidavit that said "Trooper Weight assaulted me by shoving me to the ground."[76] The court found nothing in Trooper Weight's personnel file was "remotely" relevant or discoverable,[77] confirming Mr. Beard's initial evaluation. And the court denied Bartlett's request for AST recording policies because they were not relevant to Bartlett's guilt or innocence.[78] As the trial date neared, Mr. Beard likely talked more with the troopers and then obtained the video.[79] Mr. Beard then sought and obtained from

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[73] Ex. V, [Tr. 81:19-23].

[74] Ex. V, [Tr. 82:1-4]. In December, Mr. Beard tried to settle the case anticipating the state's budget problems could restrict travel. The case was dismissed in February because of the budget cuts, which included layoffs and cuts in travel, despite Mr. Beard's direct request to the DA for permission to try the case.

[75] Ex. V, [Tr. 32:5-11].

[76] Ex. AA.

[77] Ex. AB.

[78] Ex. AC.

[79] Bartlett's misplaces focus on the discrepancy between Trooper Weight and David Krack regarding whether, after Bartlett's arrest and during Trooper Weight's administering of a breath test to the teen, Krack denied that he knew Bartlett. This is not material to

KTVA an enhanced version of the video, which repudiates Bartlett's claim that Trooper Weight assaulted him. Beard believes that the video shows that Bartlett's right hand was up and that Trooper Weight moved him back in response to Bartlett moving forward.[80]

Mr. Beard disagrees with Bartlett's arguments that the video shows the troopers' reports were misleading or omitted material information. Mr. Beard interprets Sgt. Nieves' order to get down along with the physical control exerted to be a "continuous advisement" to Bartlett that he was under arrest.[81] Mr. Beard would have used the word "struggling" instead of "fighting" to describe Bartlett's conduct during the arrest, but Mr. Beard believes that the video shows evidence of resisting.[82] Mr. Beard heard Bartlett make "spittle" sounds and "mush mouth," recognizing that the video depicts only a few brief phrases.[83] Mr. Beard agrees that the video does not depict an attempted head butt[84]

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probable cause. The question only highlights that Trooper Weight did not know Bartlett's connection to them *before* Bartlett's arrest. The teen does not recall Trooper Weight asking the question.

[80] Ex. V, [Tr. 145:12-146:11].

[81] Ex. V, [Tr. 136:6-11].

[82] Ex. V, [Tr. 139:19-140:2].

[83] Ex. V, [Tr. 103:4-21].

[84] A head butt can be performed with a forward, rising, sideways or backwards motion; each being effective from different positions. Trooper Weight only says "attempted." https://en.wikipedia.org/wiki/Headbutt

but does not agree that means Trooper Weight's statement is false or material.[85] Mr. Beard believes "grounds for the arrest were established" long before that.[86] Mr. Beard interprets the video to show that during the arrest Trooper Weight lost control of Bartlett's right hand after Bartlett yanked it free, and that Sgt. Nieves saw that.[87]

From the outset, Mr. Beard relied not only on the reports, but also on all three troopers, their credibility, his belief that Bartlett's defense was frivolous, and his own law enforcement experience, which uniquely informed his work. As the case progressed, his initial evaluation was reinforced by the court's orders, the KTVA video, and the enhanced version.[88] Mr. Beard continues to believe that probable cause exists that Bartlett committed the crimes of harassment, disorderly conduct, assault, and resisting arrest. He believes the troopers' conduct was "very appropriate," "very controlled," and that they made a "good arrest."[89] *Newman v. County of Orange* rejected an attempt much like Bartlett's to undermine a prosecutor's

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[85] Ex. V, [Tr. 129:7-17]. If Trooper Weight had removed his hand from the back of Bartlett's neck area while they were near the ground, Bartlett's head could have head-butted one or both troopers. Trooper Weight's entire visual field at that time was occupied by Bartlett's head and upper body.

[86] Ex. V, [Tr. 152:8-18].

[87] Ex. V, [Tr. 137:8-18].

[88] Ex. V, [Tr. 33:7-12].

[89] Ex. V, [Tr. 32:23 – 33:2].

independence based on conflicting accounts, explaining that the discrepancies must be material and the standard also requires determining whether the prosecutor would have pursued the prosecution "not based on *plaintiff's* story, but whether he would do so based on the *officer's*."[90] Thus, when the prosecutor would pursue the charges based on the officers' facts as Mr. Beard's testimony confirms, absolute immunity applies.

CONCLUSION

Bartlett has not met his burden to show the troopers in Bartlett's case violated clearly established law when they arrested him without injury. Bartlett effectively abandons all claims raised in his complaint, emphasizing irrelevant cases and trivial speculation and innuendo. The troopers were doing their jobs and working hard to protect vulnerable Alaskans from the high risks of alcohol. Bartlett, after drinking beer throughout the night, interfered dangerously close to Trooper Weight. Bartlett's conduct spurned a dynamic, unpredictable, rapidly evolving, and potentially dangerous situation. As the teen succinctly put it, Bartlett's conduct was "scary." The decision to arrest Bartlett was consistent with well-established law throughout the country and the force used to arrest and secure Bartlett was restrained and objectively reasonable – no one was hurt. Even if this court were to conclude that the troopers made a mistake as to the facts or the law, any such mistake was reasonable. Bryce Weight and Luis Nieves are excellent troopers;

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[90] *Newman v. County of Orange*, 457 F.3d 991, 995-996 (9th Cir. 1996)(emphasis in original).

they are entitled to qualified immunity and this matter should be dismissed with prejudice.

DATED: March 31, 2016.

CRAIG W. RICHARDS
ATTORNEY GENERAL

By: /s/Stephanie Galbraith Moore
Stephanie Galbraith Moore
Senior Assistant Attorney General
Alaska Bar No. 8911063
Department of Law
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-5190
Facsimile: (907) 258-0760
Email: stephanie.galbraith@alaska.gov
Attorney for Defendants Luis A. Nieves & Bryce L. Weight

* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]

Exhibit S

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

Case No. 4:15-cv-00004-SLG

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
v.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Defendants.	)

AFFIDAVIT OF MELODY S. MISULICH

STATE OF ALASKA)
) ss.
JUDICIAL DISTRICT)

Melody S. Misulich, being duly sworn, states as follows:

1. I am the Paralegal II assigned to the above-captioned matter and I have personal knowledge of the matters stated in this affidavit.

2. At the request of counsel, Assistant Attorney General Stephanie Galbraith Moore, I prepared an

informal transcript of Sgt. Jason Pugh's audio (SOA 0527-0528).

3. I am familiar with Sgt. Luis Nieves' voice and Russell Bartlett's voice from watching the KTVA Arctic Man video multiple times.

4. I have listened to the audio (SOA 0527-0528) numerous times and have transcribed it to the best of my ability. The six page transcript I prepared is attached hereto.

5. I am not an official court reporter.

/s/Melody S. Misulich
Melody S. Misulich

SUBSCRIBED AND SWORN TO before me this 31st day of March, 2016.

[SEAL] /s/Cassidy White
Notary Public in and for Alaska
My Commission Expires: w/office

Informal Transcript of Jason Pugh Audio

Pt 1 (DM100104.WMA) SOA 0527

[Yelling and cheering]

Unknown 1: Go ahead.

Unknown 2: Got it?

Uknown 1: Go ahead and open it guys.

Bartlett: [garbled speech]

Nieves: I'm the sergeant. Reading your rights. Now you're going to jail.

Bartlett: For what?

Nieves: Harassing my trooper.

[background noise]

Bartlett: I was not harassing.

Nieves: Yea, you were. You could have walked away.

Bartlett: I want your commanding officer here now.

Nieves: I'm it! I'm it! I'm it! I'm it. [Bartlett yelling something, possibly bullshit?] I'm it, you're talking to him now.

Bartlett: What are you fucking talking about?

[background noise and yelling]

Bartlett: You're singling me out.

Nieves: Now you're going to jail. Now you're going to jail.

Bartlett: For what?

Nieves: For challenging my trooper to a fight.

Unknown 3: Miner!

Unknown 4: I think so.

Unknown 5: Because, I gotta wait until they're done talking to me. I'll be, they said I'll be done in a minute and then they'll let me go. But I gotta do community service...

[garbled speech]

Unknown 6: Guys, what's going on?

Unknown 7: I guess we got, I dunno, some minor consuming. I didn't drink anything. Someone like. I didn't drink anything purposely. Someone handed me a red solo cup and said it was red bull and I've been drinking red bull and rock star all day. It happens. I should have, I should have....

Unknown 6: I don't know what's going on.

Unknown 7: Me neither. I really don't. I'm just trying to cooperate.

[garbled speech]

Unknown 8: Daniel!

Bartlett: I did nothing illegal. And I. no I, no. no I did not.

Nieves: Yea you did.

Bartlett: No I did not. [garbled speech]

[coughing]

[loud music and partygoers yelling]

Unknown 10: Race war! Race war!

Bartlett (possibly): Not a threat to him. I was not a threat. Not a threat. I was...

Unknown 9: you are lying.

[garbled speech]

Pt 2 (DM100105.WMA) SOA 0528

Bartlett: No. Bullshit. I did not.

Nieves: You're ridiculous. You're being ridiculous.

Bartlett: Sir, sir.

Nieves: Challenging my trooper to a fight.

Bartlett: No I was not. You are being totally uncompliant. That's not it. That's not what happened.

Nieves: Okay.

Bartlett: That's not. You are falsifying.

Nieves: Okay.

Bartlett: You are falsifying. I was here having a good time with my friend and then...

Nieves: And then you approached the trooper in an aggressive way...

Bartlett: Yes I did approach the trooper but not in an aggressive manner.

Nieves: Yea you did.

Bartlett: That is ridiculous.

Nieves: Yea you did.

Bartlett: No!

Nieves: He told you to leave...

Bartlett: No, he did not.

Nieves: And you wouldn't.

Bartlett: He pushed me. When I walked up and asked what was going on.

Nieves: No no no no no.

Bartlett: No no no.

Nieves: No no.

[Bartlett and Nieves talking over each other]

Bartlett: No, that's what you're saying.

Nieves: Okay. You're done. You're going to jail.

Bartlett: No I'm not done. This is ridiculous. You guys are not here to serve...

[partygoers talking, loud music]

Unknown 1: Race war! Race war!

[multiple people chanting "race war"]

Unknown 2 (possibly Pugh?): What's that?

Unknown 1: Race war.

Unknown 2: Race war? There you are again, man

Unknown 1: Race war! Race war! Race war! [laughing]

Unknown 2: How you doing? How you doing?

Unknown 1: [chanting "race war"]

Unknown 3: What is going on here?

Unknown 2: I just showed up and they had a guy on the ground so. I don't know what's going on.

Unknown 3: All I see is two guys coming...

Unknown 4: Hey how are you guys...

[people talking over each other]

Unknown 5: Thank you they're orange.

Unknown 2: I'm still trying to figure everything out.

Unknown 5: Yea well it happens. You know, it falls off.

Unknown 13: I hope it's not going to hurt.

Unknown 2: You guys having a good time?

Unknown 6: I'm having a great time. Some people are getting out of hand though. So, it happens.

Unknown 2: Just don't be one of those guys.

Unknown 6: Oh no, we're not.

Unknown 7: What one of guys?

Unknown 2: The ones that get out of hand.

Unknown 6: No, we're staying safe. We're having fun.

Unknown 2: That's the important part, staying safe.

Unknown 1: Race war.

Unknown 2: What are you talking about?

Unknown 1: Race war?

[People laughing, someone says "damn it, what the fuck?"]

Unknown 1: I felt the wrong vibe. I felt the wrong vibe.

Unknown 2: That's going to be a pretty small war since everybody here is white.

Unknown 1: You know, I figured it would be a lot easier to ramp up some sympathy. I figured [starts slurring]

[people laughing]

Unknown 7: ...authority...

Unknown 8: Because you don't know what's right and what's wrong.

Unknown 12: I wanna get up there.

Unknown 10: You're gonna get in trouble. I don't know.

Unknown 9 (possibly Sadler): Hey.

Unknown 10: We're not [garbled] so it's not illegal, right?

Unknown 9: Hey, can I talk to you guys for a second, please?

Unknown 11: All right.

Unknown 9: I don't know if you guys are going to be here all night. Is it all the point where you guys are just gonna watch it the whole night, I mean, I don't want any ...

Nieves on radio: Assign it to trooper Weight.

[People talking over each other, cheering in background]

[Garbled speech from dispatcher, at one point she said Bartlett]

Nieves on radio: Yea, 10-4.

Exhibit V

Bartlett v. Nieves
Raymond Beard on 02/23/2016

Pacific Rim Reporting
907-272-4383

* * *

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conveyed to you, how you perceived it. It says, "Russell stepped" -- right at the very bottom of the first page.

"Russell stepped forward to where his chest was almost touching mine and his face very close to mine. I took this action by Russell to be combative in nature. I placed both hands on Russell's chest and pushed him away from me. Russell came at me again."

Okay. I want to talk to you about that statement.

A. Okay.

Q. As you review that statement, does that statement convey to you the idea that what caused Trooper Weight to shove Mr. Bartlett is that Mr. Bartlett stepped forward to where his chest was almost touching Trooper Weight and his face very close to Trooper Weight?

MS. MOORE: Objection; form of the question.

A. I would actually look to the earlier portion of the report. That would be part of what we would be including, but going back, I think you're starting in paragraph three, looking in paragraph two, "As I was

investigating, Russell P. Bartlett," his identification number, "approached me in an aggressive manner. He walked straight towards me and had a look of anger on his face. Russell put his arm between me and the

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juvenile and informed me that I could not speak with the juvenile. He told me I had no business talking with the juvenile and I needed to leave him alone. I attempted to explain to Russell what I was doing and why I was speaking with the 16-year-old, investigating minors consuming alcohol at a party.

"Russell continued to get in between me and the juvenile and continued to be hostile and aggressive. I smelled the strong odor of alcoholic beverage coming from Russell's breath, and Russell was slurring his speech."

That preceded -- and at this point, from that paragraph, was looking as far as the charge that was filed, the disorderly conduct, creating the hazardous situation, that information in and of itself, that second paragraph was what I would be looking to as far as the disorderly conduct of creating the hazardous situation.

And here I see that the officer had articulated specific facts which would give the probable cause for the disorderly conduct charge.

Q. My question is a little different, and I appreciate you giving us a little more background on that, but my question is a little different to you.

My question is: As you read this document and

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you look at what action was taken by Mr. Bartlett that precipitated and what was the final act that allegedly precipitated the shove of Mr. Bartlett?

Isn't it a fair reading of this that the final alleged act is that Mr. Bartlett stepped forward where his chest was almost touching mine, his face very close to mine, and then the trooper took that to be combative in nature so he placed both of his hands on Russell's chest and shoved him away from him?

MS. MOORE: Objection; form.

Q. Is that not a fair reading of that statement, Mr. Beard?

A. No, it's not. In fact, as I had explained, paragraph two is what I was looking at as far as what would justify the arrest for the disorderly conduct creating the hazardous situation. This third paragraph that you're referring to is one where I began looking at saying do we have another offense that occurred, do we now have a fear assault, do we now have -- you know, in that aspect, do we have an attempted assault.

This is the aspect I started looking at: Is there another uncharged crime that did occur, but as far as the disorderly conduct creating the hazardous situation, that is specifically articulated in paragraph two.

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You could read into paragraph three of that being additional information to be able to support that, but even before paragraph three, the officer has

already made out sufficient articulated facts to support the probable cause for the disorderly conduct.

The other aspect of him coming closer, he's very close, very close to mine, the combative nature, that is, you know, additional facts that would support and may be facts that would support another charge. The officer didn't make any other charges to it, so we didn't go any further than that.

Q. Mr. Beard, I'm not asking you what portion of this supports in your view a charge of disorderly conduct.

A. Okay.

Q. So let's -- if we could move on past that, I would appreciate it.

What I'm asking you is whether when you read this statement, this sentence that I have just stated to you now on two occasions, that you read that statement as saying that this is the final step that took place that precipitated Trooper Weight in taking the action of shoving Mr. Bartlett?

MS. MOORE: Objection; form of the question.

A. I would think at least in the way that it's

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citation for it. I think he had his vehicle to where he had the radio contact and the computers and the rest of the things that he would need.

Q. Can I focus you a little more, Mr. Beard?

A. Certainly.

Q. Does Trooper -- did Trooper Miner relay anything to you in terms in his observations that would be relevant to the charges that were filed against Mr. Bartlett?

A. Not that I recall. In fact, I think when I had asked him what did he see, he said he was too far away from it, that his vehicle was down there. So in essence, you know, Trooper Weight was doing the catching, Trooper Miner was doing the cleaning, but he wasn't actively involved in that arrest situation.

Q. Okay. Now, as you -- you said you reviewed this video a number of times, and let me just ask if we can agree on this, that the video establishes that there is very loud music being played at this party, correct?

A. I believe so.

Q. In fact, the video establishes that for people to communicate with each other verbally that they would need to stand closer to each other than a normal distance to effectively communicate, correct?

MS. MOORE: Objection; form.

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(Video playing)

Q. That's it. Did you hear slurred speech anywhere in there, Mr. Beard?

A. I heard a few brief phrases that he was saying or yelling. At one point, it sounded almost spittle coming

out, the mush-mouth kind of, but it's very brief as far as --

Q. Well, why don't you --

MS. MOORE: Let him answer, please.

A. But as far as what we can hear from the video here and what's captured, there are very brief phrases, and I don't know that it would be significant enough for me to be able to determine whether from that two or three words that was slurred, especially with the background of the noise.

We don't have the other audio, so as far as this portion, I don't know that it is showing anything more than I can observe of that. I can hear the yelling. I can hear what sounds like a, what I would describe as mush-mouth, almost the spittle of the words, but at that point, the video is only capturing the back of his head.

I can't see the front, but there are only -- I don't think there is more than two or three words in any of the phrases that I'm hearing, so I don't know that there is enough there to be able to -- for me to

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but was unsuccessful. Sergeant Nieves verbally threatened to use the use of a taser and Russell went prone and placed his arms behind his back."

So we know that the headbutt took place before Russell was prone and his arms behind his back, correct?

MS. MOORE: Objection; form of the question.

A. At least as far as the sequence of the events, yes, then I would agree with that is where it should have occurred.

Does this video show that? No, it doesn't, at least not clearly from the perspective that I can see of the camera. The one aspect I think that you had asked about as far as that being a false question, well, something may be inaccurate, but not designated specifically as false.

And as far as looking at the probable cause of this arrest --

Q. I'm not asking you that question, Mr. Beard. I'm not asking you that. I think we have covered that at least twice now.

So, again, and I'm going to try to be very specific with my question. I want you to point out to me where on the video is it that, quotes, "Bartlett clenched his fist as I grabbed his left arm, shouting no." Do you contend that the video corroborates that

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accusation in the supplemental report of Sergeant Nieves, and, if so, give me the counter number, please.

A. Well, again, I don't contend that the video corroborates any specific fact.

Q. I'm asking you that question here. I'm not asking you whether you did in the past. I'm asking you to right now.

Do you believe, as you sit here and look at this video today, do you believe that this video corroborates Sergeant Nieves' supplemental report where he says, quotes, "Bartlett clenched his right fist as I grabbed his left arm, shouting no"?

(Video playing)

A. I think we just saw a quick second there about 2:08, 2:09 of I was looking specifically at Mr. Bartlett's right hand, and I saw what appeared to be the glove closing going into the clenched fist.

(Video playing)

Q. And you contend he shouted "no"? Does this video confirm that?

A. This video at 2:12, you can see Mr. Bartlett looking directly at Sergeant Nieves. His mouth is completely opened. It likes like he is expressing something. His face is clenched, in what I would think to be a very angry offensive type of a position.

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Trooper Weight is apparently attempting to take control of Mr. Bartlett's right hand and arm at this point.

Q. Mr. Beard, I didn't ask you these questions.

A. You were asking about the clenching of the fist, so I'm trying to go through each of these to look about the clenching of the fist, because here we can see beginning at 2:12, fist is clenched, as best this video can tell.

And there we see even pulling his arm away from Trooper Weight. And I can't see his fist, but I assume that it's a balled fist that's here near, or somewhere in the close proximity of Trooper Weight's groin area.

And, yeah, so there is several instances through here where I can see that Mr. Bartlett is clenching his right fist.

Q. Go back and look at the supplemental report again so that we can get this. The statement is: "Bartlett clenched his right fist as I grabbed his left arm, shouting no."

So these things are alleged to occur, as I read this, in proximity to each other. Did you hear on the video Mr. Bartlett shout "no" at any location?

A. I'm hearing shouting, but I'm not sure that I can distinguish what is being said.

Q. I think if you listen closely you will hear him

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just simply stating in a straightforward manner the fact of the matter is that Sergeant Nieves did not advise Mr. Bartlett he was under arrest?

A. No, I could not say that at all, because –

Q. Okay. That's fair enough.

A. If you ask the question, "Did you hear him say you are under arrest," my answer is no, I did not hear from this audio him say, "You are under arrest."

Q. And this kind of parsing that you have been going through in reference to this rather simple question, is that reflective of your whole approach to how you analyze the evidence in this case?

A. I think it's the approach that we take as attorneys to make a clear distinction, because, as attorneys, we parse words. Words have meaning. And we also have to look at the actions that are doing.

As far as my review of the case, and I think this is where you have got completely off track of, my review of the case is not looking to an officer's specific statements of -- or trying to corroborate each and every individual statement, but is there probable cause for an arrest, am I able to be able to develop this into proof beyond a reasonable doubt at trial? Those are the aspects that I'm looking at. Did the individual --

Q. Those days are long behind us, aren't they? I

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probably count six, seven, eight, nine times, "get down, get down, get down, get down," that is -- I mean, he has got his hands on the person. He is clearly attempting to effect an arrest, and Mr. Bartlett is not complying with those instructions.

I mean, I would say that he informed him repeatedly that he was under arrest. Twice? No, far more. He informed him at every one of those statements: "Get down, get down, get down," and the physical control that he is exerting is a continuous

advisement of "you are under arrest." That's how I would view that portion of the video.

MS. MOORE: Are you going to continue watching the video?

Q. I think so here. I have got a couple left. "I advised him" -- again, on Trooper Nieves: "I advised him again that he was under arrest, as he pulled away from me as he swung his right fist towards me."

What section of the video do you believe either confirms or disputes that particular sentence?

A. The portion I would say that would be from what we're capturing, and, again, looking at -- knowing what the officers are writing in their report, they are writing -- this is a very fluid incident that's happening. The officers are responding to it

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immediately, actions move quickly. How much a person is able to perceive and remember is always something that's in question.

And the officers clearly don't have the benefit of being able to go video by video, frame by frame, seeing what happened. Here we can see, as to your question, when Trooper Weight is trying to control the hand, we're at 2:12. And there at 2:13, we see that it looks like Trooper Weight has lost control of that hand, Mr. Bartlett has yanked it away. It is now floating free.

Here we see Sergeant Nieves looking directly at that. He can see from his position, or at least what the camera is kind of showing to us, is that his view is down towards that area. He can see that Mr. Bartlett's

right hand has come loose, and there is where they are continuing to exert the force, trying to get that hand under control.

Here at this frame, 2:14, we see that Trooper Weight's right hand is back up on the chest. He doesn't have the same grip and control.

Q. Mr. Beard, I need to interrupt you. I apologize. I want you to just relay to me the counter numbers. I don't want your explanation of it. I just want you to give me the counter numbers where you contend this

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Q. 2:06 to? The question is "to fight with us."

A. Probably to about 2:20 seems to be the point where he begins at least allowing -- well, where -- that's where it kind of ended there, the handcuffs, so I can't see what happened after that, if that was the end of it or if there was more action following, but --

Q. As far as what we have here, your contention is from 2:06 to 2:20 of the video demonstrates where Mr. Bartlett is continuing to fight with the troopers, correct?

A. That would be the point that I would think that Sergeant Nieves is referring to.

Q. But my question is a little more specific than that. Is what you see on this video consistent with this sentence, you believe it is an accurate -- the sentence accurately depicts a portion of this video where Mr.

Bartlett is, quotes, unquotes, "fighting with trooper -- the troopers"?

A. I would not choose the word "fighting." That wouldn't be my choice. "Struggling," I would use that. I don't see fists of fury flying or anything of that aspect.

It is more the struggle and the resistance rather than -- and, again, that's where I was parsing out of is what they are describing an assault or merely the

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resisting. And I see that there is evidence of the resisting, not of an assault.

So as far as the word "fighting" that Sergeant Nieves chose to use, I wouldn't have used that word after reviewing this video.

Q. And I'm not asking you whether you would use the word or not. I'm asking you whether or not you believe there is any portion of this video, from your perspective, that demonstrates Mr. Bartlett fighting with the troopers.

A. Fighting, no. Again, with that explanation of had he -- if I saw evidence here of fighting, then there would have been a different charge. That would have been an assault charge or an attempted assault charge, but the aspect if I can understand Sergeant Nieves' use of that word fighting, but I would think another word is more descriptive of what was occurring, struggling, resisting, something in that aspect.

Q. Let me make sure I understand. Here in your affidavit you say, "The enhanced video reveals Bartlett's right hand was raised about chest level and

was near Trooper Weight when Trooper Weight pushed Bartlett away."

And this very well may be the individual clips that you need to go to for this, but here is my question

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else.

MS. MOORE: Any more interruptions and we will take a break because –

BY MR. WILSON:

Q. Go ahead. We'll get through this.

A. So again, here at two seconds, here we see right here. And this is immediately at the point – I mean, we're still at only two seconds, even though I have gone frame by frame by frame, we don't have any further delineation of this, so as far as your question as to which frame, it's still at two seconds.

But immediately when Trooper Weight's hands are making contact with Mr. Bartlett's chest, right there we see his hand is already up.

MS. MOORE: Bartlett's hand?

A. I'm sorry. That is Mr. Bartlett's right hand. You can see the reflector on the sleeve. It is already up immediately at the point where Trooper Weight is doing the shove back of Mr. Bartlett.

So at that point, there is, as we have gone frame by frame by frame, there is no way that from that

contact time this hand, if it was resting down on the right, would suddenly be up and in sight. It could not have happened. This is where, showing that when Trooper Weight was saying, yes, his hand was coming up at me,

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this is where we can see that his hand clearly, although it's behind this juvenile individual, we can't see where that right hand is, but Trooper Weight is responding to that right hand being raised.

He is shoving Mr. Bartlett back, and at that very moment of contact, this is just a few frames of within one second that we're doing it, the hand is already up. So if we were able to move, if it had some technology to be able to move that minor out of the way, you would be able to see clearly Mr. Bartlett's hand is up towards Trooper Weight's face. It's in that area.

Q. In the two-second frame is where you're contending?

A. Yes, it is still within – and which frame by frame, if we could break that down frame by frame.

Q. Let's go to the frames and let's see the first frame where you say you see the –

A. Your frames don't have it. Your frames don't break down, I think –

Q. Let's see if my frames show those at all, and then you can tell me if they are there or not, and tell me which frame it is, if it's there. If it isn't, that's fine.

A. It's not in this. You can't see that portion.

MS. MOORE: It's filmed at 30 frames per

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A. I wouldn't make that contention at all. What I see from here, at least as far as the response --

Q. It's a coincidence or it isn't.

MS. MOORE: Objection; form of the question.

Q. Is it a coincidence that Mr. Weight shoves Mr. Bartlett just right as Trooper Nieves arrives? In your mind, does that have anything to do with Trooper Weight's actions?

A. No, absolutely not. What I see here as far as --

Q. That's all I needed from you.

A. I have got a continuation to that question.

Q. Go ahead.

A. Again, excuse me. My sinuses are still draining.

What I can see from the view of this as to what is prompting Trooper Weight's response is Mr. Bartlett making that shift of his shoulder towards Trooper Weight, and, again, with that hand, you can't see it in the view, but the hand is up and towards -- now, the timing of the events, it looks like Sergeant Nieves; I mean, this is very close in proximity in time.

Sergeant Nieves is making the approach. Just briefly after that, frames after it, Mr. Bartlett has his hand up towards Trooper Weight. And then within just

those few frames, Trooper Weight is doing the shove back. And immediately at the contact again, that's

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thought that Mr. Bartlett was going to punch Trooper Weight, you would expect that to be in the police report, right?

A. If what you're conveying was -- hold on. Let me answer that. Because if it is as you are trying to say it, then I would have expected that to be an assault charge.

What I'm reading here from the force -- excuse me -- about the disorderly conduct creating the hazardous situation, the individual, I mean, he has already clearly created that even before he reached his right hand up towards the trooper. So as far as the probable cause to arrest him for that disorderly conduct, even -- you know, that portion is not the immediacy of the arrest, I don't think so, as far as doing the grounds for the arrest.

The grounds for the arrest were established long before he reached his hand up towards -- and that's where I was looking at saying do we have a fear assault, did the trooper fear that Mr. Bartlett was attempting to assault him with the right hand. And that was one of my lines of inquiry as to, you know, what was the trooper perceiving, was he in fear of assault.

He did not delineate that in his report. He didn't make those charges, so I didn't go with that.

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But as far as the probable cause to effect an arrest for disorderly conduct of creating the hazardous situation, that occurred long before Trooper Weight shoved Mr. Bartlett back.

Q. I understand that's your position, Mr. Beard. I'm trying to ask you a little different question, which is that if in fact Mr. Weight was fearful of Mr. Bartlett striking him with his fist, and that's why he shoved Mr. Bartlett, you would expect to see that in this police report, wouldn't you?

A. If he -- well --

Q. That's a very specific question. I would ask you to answer it either yes or no.

A. I would say that had he charged him with assault or fear assault, then, yes, I would expect that to be in there, because that is the -- that would meet the elements of the offense. He didn't. He only charged with the disorderly conduct, and, therefore, since he is not charging an assault or an attempted assault or a fear assault, then the fact that he didn't include those is not something that is -- what I would consider out of the ordinary.

Q. Even though he elects to include, and both of these gentlemen elect to include "Russell stepped forward where his chest was almost touching mine, his

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face was very close to mine. I took this action by Russell to be combative in nature. I placed both hands on Russell's chest and pushed him away from me."

Now, for whatever reason, they elect to include that in the report, right? Doesn't it strike you as rather odd that they would choose to put these things in there that are relatively at least, less indicative of somebody being assaultive towards them, than someone being fearful of being punched in the face?

MS. MOORE: Objection; form of the question.

A. Would it be odd, that was your, I think your question. No, it's not odd, but if it raises questions, then you have to go to the trooper to say, "Why did you elect to put these facts in and not the others."

Q. Because you kind of wonder, well, geez, why would you put insignificant, less significant material in there and omit more significant material that would make the very same point you're trying to make, but do so more effectively, right?

MS. MOORE: Objection; form of the question.

Q. Go ahead.

A. I'm trying to figure what the question was. Is it odd or unusual? No, it's not. In fact, what I usually -- in reviewing most of the officers' reports that come in, it often surprises me what facts they

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intend to put in the reports and what things they eliminate. That's why we often have to ask for supplemental reports, for additional investigation, tell me what was going on, why didn't you tell me this was happening.

Or we end up, if there is audio, we listen to the audio and find that there is wonderful evidence that's presented in the audio that's not reflected in the officers' reports. So as far as the clarity of the reports, what information they put in, what they don't put in, I would say that pretty much none of that is odd.

In fact, it is often typical and usual. I would want the officer's -- I, for one, would like to teach the officers how to write better reports, how to focus on the elements of the offense and relating to those things and eliminate a lot of the non-relevant, frivolous things that they end up usually putting into the reports. So as far as the oddity of it, no, nothing odd whatsoever.

Q. So it's entirely consistent with your experience that a police officer would be fearful of being punched in the face, they would charge an individual with other crimes, such as disorderly conduct and resisting arrest, and just completely omit any reference to that event

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taking place?

MS. MOORE: Objection; form of the question.

A. I think there is often -- you know, the officers have to make the decision as to what charges that they are going to file, and many of them let a lot of things go.

There is often plenty of evidence of an individual having committed a particular crime and the officers never focus on that whatsoever. That's part of their discretion and how they want to convey. Many of the troopers don't want to ever file charges against an individual for fear assaults or attempted assaults.

Some of them consider it's just part of the job. And they often, as we see with the troopers more often is cut people breaks, charge them with less than they possibly could have, and that's where, you know, I generally have to look to and say, "Did they capture everything that was there."

That's why I had some specific questions for these officers when I saw the evidence, going, why wasn't there any charge for fear assault or attempted assault? Was there not sufficient facts? Because from what I see, we could make out that case. You have elected not to to charge that. Why?

And often it's just that they don't. They don't

[p.157]

charge everybody for what they could, and they give a lot of people breaks, whether it's stopping somebody for speeding at 15 miles an hour and they write them for nine, or they write them for four, simply because they want to give the person a break and have a reduced penalty.

Much of it all just depends. And so in this case of seeing that the officer is not charging it, it's not a surprise whatsoever. And for them to even not reference those things or, you know, not be in something that was – you know, we're able to detect it because we can go frame by frame, second by second on this instant replay.

The officers involved in the situation, they only have their eyes, their perception, their memory to go by, and so, no, it's not surprising whatsoever.

MR. WILSON: Let's take a break.

VIDEOGRAPHER: Going off record. The time is 2:51.

(There was a short break.)

VIDEOGRAPHER: We're back on record. The time is 3:07.

BY MR. WILSON:

Q. Mr. Beard, let me just follow up on some things you said here towards the end -- before our last break.

* * *

Exhibit Y

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. 4:15-cv-00004-SLG

RUSSELL P. BARTLETT,	)
	)
Plaintiff,	)
	)
v.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Defendants.	)

DEPOSITION OF RUSSELL BARTLETT
July 27, 2015

APPEARANCES:

FOR THE PLAINTIFF:

ZANE WILSON
CSG, INC.
714 Fourth Avenue, Ste, 200
Fairbanks, Alaska 99701
(907) 452-1855

FOR THE DEFENDANTS:

STEPHANIE GALBRAITH MOORE
Department of Law

1031 West Fourth Avenue,
Suite 200
Anchorage, Alaska 99501
(907) 269-5190

* * * *

* * *

[p.37]

A He was 16 .....

Q Okay.

A ..... at the time.

COURT REPORTER: I'm sorry?

A He was 16 at the time.

COURT REPORTER: Thank you.

A Not a problem.

Q What high school does he attend?

A I believe it's North Pole High.

Q What -- so what grade will he be in this year?

A I'm not completely sure.

Q Have you ever had any guardian responsibilities for McCoy Walker?

A Guar – no, I have not.

Q When is the last time -- well, let me ask this. Have you seen McCoy Walker since April of 2014?

A Yes.

Q And where did you see him?

A I believe, if I can recall correctly, I've seen -- I -- back when the trial was still going on and it hadn't been dismissed, he wa -- he could not find out -- he had to go to Mr. Wilson's office and he didn't -- couldn't find it, so I offered to take -- bring him down here and show him where it's at. And then af -- that was the first time after that I remember speaking

* * *

[p.82]

down -- down on the si -- on my left side, against my side.

Q And where was your right hand?

A I don't recall exactly where my right hand is, but it was probably right here on my side.

Q Did you raise your right hand toward Trooper Weight's face at any time while you were standing near him?

A No, I did not. Can I get some water, please? Do you mind?

COURT REPORTER: I'm sorry.

A No, no, I mean .....

MS. MOORE: Sure, let's go off record and we'll make sure it -- the other witness may be here.

COURT REPORTER: We're off record. Time is 1:56.

(Off record)

(On record)

COURT REPORTER: We're on record. Time is 2:01.

Q Mr. Bartlett, we're on -- yes?

A I'd like to revisit the last question that you .....

Q Okay. So I just want to -- we took a 10-minute break and you want to revisit a question? What was the last question?

A The question of me -- at any time, did my hand ever raise up when I came in contact with Trooper Weight.

Q And .....

[p.83]

A You said at any -- any time, and I wanted to -- I wanted to rephrase my -- my -- my answer, being that -- being that it -- it did raise up after the fact that he -- after he assaulted me, my hand did come up during that -- that period, when he struck me.

Q Okay. So your version is that he -- why don't you describe what happened.

A After I made that statement to Trooper Bryce Weight and he said, no, and struck me with both palms of his hands in my chest, I went flying backwards. At that time he hit me, my -- my right hand had rose -- rosen [sic] up a little bit.

Q It rose up a little bit?

A Yeah, it rose .....

Q From where?

A From the side -- my side down here .....

Q And did .....

A ..... alongside my hand -- alongside there.

Q And your hand is down by your leg?

A Yeah. Well, it's down by my side, yeah.

Q Why don't you go ahead and stand up and show me where your right hand was when you stopped in front of Trooper Weight.

A Okay. This is how I recall it happening. I had it down, like -- kind of like this.

* * *

Exhibit AA

SOA 0072 - SOA 0073

IN THE DISTRICT COURT FOR THE STATE OF ALASKA THIRD JUDICIAL DISTRICT AT GLENNALLEN

Case No. 3GL-14-25 CR

STATE OF ALASKA,	)
	)
Plaintiff,	)
v.	)
	)
RUSSELL PAUL BARTLETT,	)
	)
Defendant.	)
	)

VRA CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

DOMESTIC VIOLENCE OFFENSES
Per AS 18.66.990(3) and (5)
[ ] ALL COUNTS [x] NONE [ ] SPECIFIED BELOW

AFFIDAVIT OF RUSSELL P. BARTLETT

STATE OF ALASKA)
) ss
FOURTH JUDICIAL DISTRICT)

I, Russell P. Bartlett, being first duly sworn upon oath, depose and state as follows:

1. I am the defendant in this matter.

2. On April 13, 2014, I did not do anything to create an unreasonable hazard to any individual and did not resist arrest.

3. Without any legitimate cause, Trooper Weight assaulted me by shoving me to the ground.

4. Trooper Weight has fabricated and/or exaggerated the allegations against me to justify his conduct.

5. I believe that the "missing" audio tape may have been destroyed to cover up evidence of the improper behavior of the officer that arrested me.

DATED this 29 day of August 2014.

/s/Russell P. Bartlett
RUSSELL P. BARTLETT

SUBSCRIBED AND SWORN to before me this 29 day of August 2014.

(SEAL) /s/Niki Lightly
Notary Public in and for Alaska
My Commission Expires: April 13/18

* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]

* * *

IN THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 16-35631
D.C. No. 4:15-cv-0004-SLG

[Filed November 3, 2017]

RUSSELL P. BARTLETT,	)
	)
Appellant,	)
	)
v.	)
	)
LUIS A. NIEVES, in his personal capacity and BRYCE L. WEIGHT, in his personal capacity,	)
	)
Appellees,	)

PETITION FOR PANEL REHEARING

Russel P. Bartlett, appellant, through his undersigned attorney, requests that the court rehear this matter on two discrete points. First, there is an inconsistency between this court's analysis of Bartlett's false arrest claim and the district court's treatment of that claim. Second, this court may have misapprehended Alaska law by affirming the district court's treatment of Bartlett's false arrest claim based upon Bartlett's proximity to Trooper Weight and the volume of Bartlett's voice.

I. The District Court never reached some issues decided by this Court.

In analyzing Bartlett's false arrest claim this Court affirmed the district court's reasoning: "Adopting Bartlett's version of the fact, we agree with the district court that defendants had at least arguable probable cause to arrest Bartlett for harassment, disorderly conduct, resisting arrest, or assault under Alaska law." [Doc. 43-1 (Memorandum disposition), at 2] But the district court did not analyze whether arguable probable cause existed to arrest Bartlett for anything other than the crime of harassment under Alaska Statute § 11.61.120(a)(1). The district court noted: "Having found that probable cause existed to arrest Mr. Bartlett for harassment, the Court *does not address* whether probable cause also existed to arrest Mr. Bartlett for disorderly conduct, assault, and/or resisting arrest." [ER 352 & n.72 (emphasis added)]

Mr. Bartlett respectfully submits that this Court overlooked the above portion of the district court's order concerning his false arrest claim. FRAP 40(a)(2) [ER 349-52] This oversight could have a significant impact on Mr. Bartlett's chances of success at trial. Mr. Bartlett requests that this Court grant his petition for rehearing to correct this court's disposition of his false arrest claim.

II. This Court misapprehended Alaska's Harassment Statute.

Based on Bartlett's "loud voice," his proximity to Trooper Weight, and the fact that Trooper Weight pushed Bartlett backwards, this Court affirmed the district court's grant of summary judgment to the

troopers on Bartlett's false arrest claim. The statute at issue, Alaska Statute § 11.61.120(a), makes it a crime to "with intent to harass or annoy another person . . . insult[], taunt[], or challenge[] another person in a manner likely to provoke an immediate violent response."

Here, it cannot be disputed that calmly and non-threateningly "standing close" to someone else at a loud party as depicted on the video, without more, does not rise to the level of harassment under Alaska law.[1] The something more in this case was Barlett's speech. Bartlett told Trooper Weight: "You don't have the authority to talk to [Walker] without a parent or guardian present." [ER 203] But the subsection of Alaska's harassment statute at issue here is "[d]irected principally at preserving the public peace, [and it] will penalize speech only when it falls within the unprotected 'fighting words' category."[2] [*See also* Doc. 7, at 24-28] The words Bartlett spoke to Trooper Weight were not fighting words. Bartlett respectfully submits that the Court may have misapprehended Alaska's harassment statute and requests that it reconsider whether arguable probable cause existed to arrest Bartlett for harassment.

---

[1] The need to stand closely to communicate over the loud music was clearly known to Sergeant Nieves due to his presence in the same loud environment.

[2] COMMENTARY ON THE ALASKA REVISED CRIMINAL CODE, Sen. J. Comm., 10th Leg. 2nd Sess. (Jun. 12, 1978) (citing *Chaplinksy v. New Hampshire*, 315 U.S. 568 (1942)).

* * *

DATED this 3rd day of November 2017.

/s/ Zane D. Wilson
Zane D. Wilson
714 Fourth Avenue, Suite 200
Fairbanks, AK 99701
Phone: (907) 452-1855
Fax: (907) 452-8154
Email: zane@alaskalaw.com
Attorney Bar #9111108

* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]

No. 17-1174

In the Supreme Court of the United States

LUIS A. NIEVES AND BRYCE L. WEIGHT,
Petitioners,

v.

RUSSELL P. BARTLETT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

JAHNA LINDEMUTH
Attorney General of Alaska

DARIO BORGHESAN
Counsel of Record
ANNA R. JAY
STEPHANIE GALBRAITH MOORE
1031 W. Fourth Ave.
Suite 200
Anchorage, AK 99501
(907) 269-5100
dario.borghesan@alaska.gov

Counsel for Petitioners

August 20, 2018

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court held that probable cause defeats a First Amendment retaliatory prosecution claim under 42 U.S.C. § 1983 as a matter of law. Does probable cause likewise defeat a First Amendment retaliatory arrest claim under § 1983?

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BRIEF FOR PETITIONER

Petitioners Luis Nieves and Bryce Weight respectfully request that this Court reverse the decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The memorandum opinion and order of the court of appeals (Pet. App. 1-6) is reported at 712 Fed. App'x 613. The opinion of the district court (Pet. App. 7-39) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 2017. Pet. App. 1. A petition for rehearing was denied on November 21, 2017. Pet. App. 40. Petitioners filed their petition for certiorari on February 16, 2018, and this Court granted it on June 28, 2018. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Petitioners Luis A. Nieves and Bryce L. Weight, Alaska state troopers, arrested respondent Russell P. Bartlett for disorderly conduct at a remote outdoor festival. J.A. 11. Bartlett later sued the troopers under 42 U.S.C. § 1983, claiming that his arrest was unlawful because, among other things, it was retaliation for speech protected by the First Amendment. J.A. 34-35. The district court found there was probable cause for the arrest and dismissed all of Bartlett's claims on summary judgment. Pet. App. 22, 37, 39. Yet the Ninth Circuit reversed dismissal of the retaliation claim, holding that the existence of probable cause for an arrest does not preclude a retaliatory arrest claim under § 1983. Pet. App. 5-6. This case asks the Court to decide whether the Ninth Circuit's rule—that the absence of probable cause is not an essential element of a retaliatory arrest claim—is wrong.

1. In the remote Hoodoo Mountains of Interior Alaska, thousands of winter-sport enthusiasts gather each spring for Arctic Man, a multi-day "booze and

fossil-fueled" festival "bookended around the world's craziest ski race." Matt White, *Arctic Man: Wild Rides and Crazed Nights at America's Most Extreme Ski Race*, SBNation, July 23, 2014, http://www.sbnation.com/longform/2014/7/23/5923357/. The event is famous for both the extreme snowmobile-assisted ski race that is its main event and the extreme alcohol consumption that surrounds it. White, *supra*; J.A. 163-65.

With upwards of 10,000 people gathering to party at a remote campsite miles from any significant infrastructure, Arctic Man presents a unique challenge for law enforcement. The State of Alaska's Department of Public Safety flies in troopers from all over Alaska to police the event. J.A. 163. Troopers are housed at a U.S. Army cold-weather testing site roughly thirty miles away. J.A. 163. Manpower is limited. Even during peak times of concern, the troopers are able to field only six to eight officers per shift. J.A. 165. In addition to conducting search-and-rescue operations and responding to snowmobile crashes and injured riders, troopers spend much of their time working to mitigate the risks to partiers associated with high levels of intoxication and sub-freezing temperatures—including sexual assault and hypothermia. J.A. 164-65.

Given the challenging conditions and limited number of officers, the troopers follow specific protocols to help keep partiers and themselves safe. Troopers are encouraged to address safety concerns proactively. J.A. 140, 164. To create the appearance of greater numbers, troopers conduct many patrols and strive to be highly visible. J.A. 165. And given the danger posed by extremely intoxicated partiers, officers are encouraged

to pair up when possible and are mandated not to enter the beer tent—the "scene of passouts and hookups, blackouts and beatdowns"—alone. J.A. 140, 163; White, *supra*.

2. Bartlett was arrested on the last night of Arctic Man 2014. Pet. App. 8. Although the arrest was captured on video, the parties dispute certain details about the charged encounter, including exactly what was said and how it was said. And as is common in cases where liability turns on subjective intent, the parties offer very different "interpretations of each other's conduct," as even aspects of the video are "indeed susceptible to more than one interpretation." Pet. App. 8, 11.

On the evening the arrest occurred, Sergeant Luis Nieves was on duty as the supervising trooper. Pet. App. 8; J.A. 140. A local news reporter who had obtained permission to shadow Sgt. Nieves at Arctic Man captured some of the night's events on his video camera. J.A. 70. At around 1:30 in the morning, Sgt. Nieves arrived at the scene of a large outdoor party to investigate underage alcohol consumption (not a trivial concern—at a previous year's Arctic Man, troopers found an underage drinker lying unconscious in a snow berm). Pet. App. 8; J.A. 140-41, 145, 164-65.

Sgt. Nieves noticed a beer keg outside of an RV at the party, and he approached the RV to ask the owner to place the keg inside. J.A. 141, 406. According to Sgt. Nieves's incident report, when he approached the RV a nearby partier, later identified as Bartlett, began shouting at the RV owners not to speak with Sgt. Nieves or let him inside. J.A. 152. Sgt. Nieves testified that after asking the RV owners to secure the keg, he

attempted to explain to Bartlett that he was investigating underage drinking, but Bartlett yelled at him, said he did not want to speak with him, and told him to leave. J.A. 187-88. Based on this brief interaction, Sgt. Nieves believed that Bartlett was "highly intoxicated" and unreasonable. J.A. 188. To defuse the situation, Sgt. Nieves chose not to engage Bartlett further; the sergeant instead left the RV and began walking back toward his patrol vehicle. J.A. 188.

Bartlett disputes this account, insisting that he did not initiate the conversation with Sgt. Nieves or yell at the trooper or the RV owners. J.A. 363-67. Instead, Bartlett testified that Sgt. Nieves approached him near the RV, tapped him on the shoulder, and asked to speak to him. J.A. 362-63. According to Bartlett, when he asked Sgt. Nieves why he wanted to speak with him, Sgt. Nieves's demeanor changed from "kind of just normal" to "more aggressive." J.A. 363-64. Bartlett testified that he told Sgt. Nieves that he did not want to talk to him and asked if he was free to go, and Sgt. Nieves turned and walked away. J.A. 364.

Shortly after that encounter, Bartlett noticed another trooper, Bryce Weight, speaking with a teenager at the edge of the crowd; Trooper Weight was attempting to determine whether the teen had been drinking alcohol. J.A. 150, 368-69. Trooper Weight reported that while he was speaking with the teen, Bartlett approached him aggressively, looking angry. J.A. 150. According to Trooper Weight, Bartlett put his arm between the trooper and the minor and insisted that Trooper Weight "had no business talking with the juvenile." J.A. 150. Trooper Weight observed that Bartlett smelled strongly of alcohol. J.A. 150-51.

Bartlett's friend David Krack, who later testified on Bartlett's behalf, admitted that both he and Bartlett were intoxicated at the time—indeed, too intoxicated to drive. J.A. 206-07.

Meanwhile, Sgt. Nieves saw Bartlett charging toward Trooper Weight and feared that Bartlett "was taking a fight to a lone trooper." J.A. 141. Sgt. Nieves rushed to assist Trooper Weight. J.A. 141.

Although Trooper Weight attempted to explain to Bartlett that he was investigating underage drinking, Bartlett remained hostile and aggressive. J.A. 150. Trooper Weight later testified that Bartlett "was talking over [him] [and] interrupting [him]." J.A. 172. Trooper Weight believed that Bartlett "was not going to . . . allow [him] to conduct [his] investigation." J.A. 157.

According to Trooper Weight, Bartlett then "put his hands very close to [Trooper Weight's] face, pointing" and moved forward so that his chest was nearly touching Weight's. J.A. 151, 157. Feeling threatened due to Bartlett's proximity, hostility, and intoxication, Trooper Weight placed his hands on Bartlett's chest and used an open-palm push (a technique taught in police training) to move Bartlett back and create space between them. J.A. 151, 157, 225.

Sgt. Nieves reached Trooper Weight just as Weight pushed Bartlett away. J.A. 141. Believing that Bartlett was "harassing or threatening Trooper Weight and that Trooper Weight considered Bartlett to be a threat," Sgt. Nieves decided to arrest Bartlett. J.A. 141-42.

Sgt. Nieves grasped Bartlett's left arm and repeatedly ordered Bartlett to back up and get on the

ground; Trooper Weight grabbed Bartlett's right arm. J.A. 142; Resp. App. Disk 1. When Bartlett did not comply and instead tensed his arms against the troopers, Trooper Weight performed a "leg sweep" that caused Bartlett to fall to his hands and knees. J.A. 151, 225-26. Video footage shows Bartlett straining to arch his head and neck against the downward pressure being applied by Trooper Weight, who was trying to bring him to the ground. Resp. App. Disk 1.

Bartlett did not cease resisting until Sgt. Nieves threatened to use a taser, at which point Bartlett went prone and placed his hands behind his back. J.A. 151. The troopers handcuffed Bartlett. J.A. 151. Sgt. Nieves then placed Bartlett in the trooper vehicle. Resp. App. Disk 1. The troopers took Bartlett to the holding tent and charged him with disorderly conduct and resisting arrest. J.A. 151. They released him a few hours later without injury. J.A. 212, 220-21.

Bartlett disputes aspects of the troopers' account of the arrest. Bartlett testified that he stood close to Trooper Weight in order to communicate over the party's loud music and did not believe he could have been viewed as threatening. J.A. 429-30. According to Bartlett, he complied with the troopers' subsequent orders to get down but went to the ground slowly because he was initially shocked, and because he did not wish to aggravate a back injury. J.A. 371-72, 375.

Looking at the video of the arrest, the district court found certain facts to be "indisputable." Pet. App. 11. The court found that "Trooper Weight, Mr. Bartlett, and the minor [were] standing very close together exchanging words" at the party. Pet. App. 11. The video confirmed that "at the time of the push, Mr. Bartlett's

right hand was roughly at shoulder height within inches of Trooper Weight's face." Pet. App. 12. The video also established that after Sgt. Nieves grabbed Bartlett's left arm, "Mr. Bartlett's right arm [swung] back, extended, then [came] forward as Trooper Nieves maneuver[ed] behind Mr. Bartlett." Pet. App. 12. The court found that after Trooper Weight executed the leg sweep, Bartlett went "down on his hands and knees as the troopers continue[d] to try to get him all the way to the ground" and that he "appear[ed] to submit to the takedown" only after Sgt. Nieves "[told] him he [was] going to 'get tased.' " Pet. App. 12.

After Bartlett's arrest, he and Sgt. Nieves exchanged words near the trooper vehicle. Bartlett testified to the following version of that exchange:

> Nieves: You're going to jail.
> Bartlett: For what?
> Nieves: For harassing my trooper.
> Bartlett: I was not harassing your trooper.
> Nieves: You could have walked away.
> Bartlett: I want your commanding officer right now.
> Nieves: I am the commanding officer. I'm the sergeant in charge.
> [Nieves puts Bartlett in the trooper vehicle]
> Nieves: Bet you wish you would have talked to me now.
> Bartlett: What are you talking—that's ridiculous. And why am I being arrested?
> Nieves: You're done.
> Bartlett: No, I'm not done.
> [Nieves closes the car door.]

J.A. 376-77. Audio obtained from another trooper on scene recorded the exchange between Bartlett and Sgt. Nieves. The recorded conversation is significantly longer than the interaction recounted by Bartlett; the recording includes Bartlett directing profanity at Sgt. Nieves, protesting his innocence, and stating that the trooper is "being ridiculous" and "totally uncompliant." J.A. 494-500. Nowhere during the exchange can Sgt. Nieves be heard making a statement resembling "Bet you wish you would have talked to me now." J.A. 494-500. In his response to the troopers' request for admissions, Bartlett admitted that the audio contains no such statement. Dist. Ct. Dkt. 62-4 at 2. Nor did any other witness testify to hearing Sgt. Nieves make a statement to that effect before, during, or after the arrest.

The prosecutor assigned to the case accepted the charges against Bartlett for prosecution. J.A. 243. The prosecutor was unable to pursue the case to trial, however, because his agency's budget did not permit him to travel to the rural court where the trial would have been conducted. J.A. 245. Because of these budgetary constraints, the State ultimately dismissed the case against Bartlett. J.A. 245.

3. After Bartlett's criminal case was dismissed, Bartlett sued Trooper Weight and Sgt. Nieves, asserting claims of false arrest and false imprisonment, excessive force, malicious prosecution, retaliatory arrest, and violations of due process and equal protection under 42 U.S.C. § 1983, as well as conspiracy under 42 U.S.C. § 1985. Pet. App. 15. After extensive discovery, the district court granted

summary judgment in favor of the troopers on all claims. Pet. App. 39.

On the false arrest and imprisonment claims, the court ruled that, even viewing all facts and inferences in the light most favorable to Bartlett, there was probable cause to arrest him. Pet. App. 22. The court concluded that "[p]articularly given the troopers' heightened challenges . . . at a crowded, large, remote event like Arctic Man, a reasonable officer could interpret a loud person acting as depicted in the videos as having committed harassment." Pet. App. 21-22. Even if Bartlett "did not intend to threaten Trooper Weight," a reasonable officer could interpret Bartlett's hand movements near Trooper Weight's face as a "challenge or taunt"—the actus reus of harassment under Alaska law.[1] Pet. App. 21-22. The court therefore concluded that Bartlett's version of the incident, combined with the video, established probable cause for the arrest. Pet. App. 21-22.

The court also found that even if there was not probable cause to arrest Bartlett for harassment, the existence of probable cause was at least reasonably arguable—in other words, clearly established law did not prohibit the troopers from arresting Bartlett based on his conduct. Pet. App. 22. The court therefore concluded that the troopers were entitled to qualified

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[1] A person commits harassment under Alaska Statute 11.61.120(a)(1) "if, with intent to harass or annoy another person, that person . . . insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response. . . ."

immunity on Bartlett's false arrest and false imprisonment claims.[2] Pet. App. 22-23.

The court ruled that the existence of probable cause to arrest Bartlett for harassment also barred his First Amendment retaliatory arrest claim. Pet. App. 37. This claim rested on the theory that Sgt. Nieves was "riled by Bartlett's earlier refusal to engage him in conversation," J.A. 257, which "rubbed Nieves the wrong way and was a significant factor in Nieves [sic] decision" to arrest Bartlett. J.A. 262. And Bartlett opined that Trooper Weight took umbrage at Bartlett's "challenge to his authority"—which Bartlett characterized as "merely expressing his belief that Weight had no right to question [the teenager] absent parental consent"—prompting him to arrest in retaliation for this perceived affront. J.A. 270, 299. The court did not assess the viability of Bartlett's theory of retaliation, but instead concluded that this Court "has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause." Pet. App. 36 (quoting *Reichle v. Howards*, 566 U.S. 658, 664-65 (2012)). Given the existence of probable cause for the arrest, the court held that the troopers were entitled to summary judgment on Bartlett's retaliatory arrest claim.

Finding no merit in any of Bartlett's claims, the district court entered summary judgment in the troopers' favor on all counts and dismissed the case with prejudice. Pet. App. 39.

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[2] Having determined the officers had probable cause to arrest Bartlett for harassment, the district court did not rule on whether they also had probable cause to arrest him for disorderly conduct, resisting arrest, or assault. Pet. App. 22 n.72.

4. Bartlett appealed the district court's decision to the Court of Appeals for the Ninth Circuit. Pet. App. 2. On appeal he reprised his argument that Sgt. Nieves and Trooper Weight arrested him "in retaliation for his earlier refusal to speak with Nieves and his later decision to question Weight's authority." Ct. App. Dkt. 7 at 35.

Concluding that there was "at least arguable probable cause" to arrest Bartlett for harassment, assault, disorderly conduct, and resisting arrest, the court of appeals affirmed summary judgment on Bartlett's false arrest claim on the ground of qualified immunity. Pet. App. 2-3. The court also relied on qualified immunity to affirm summary judgment on Bartlett's excessive force claim, noting that it was aware of no existing case in which an officer in similar circumstances was held to have violated the Fourth Amendment. Pet. App. 4. And because Bartlett had not shown an absence of probable cause for his arrest, the court affirmed summary judgment on his malicious prosecution claim. Pet. App. 4.

But despite concluding that the troopers had probable cause to arrest Bartlett for assault, disorderly conduct, harassment, and resisting arrest, the court of appeals reversed summary judgment on Bartlett's retaliatory arrest claim. Pet. App. 4. The court relied on its earlier holding in *Ford v. City of Yakima*, 706 F.3d 1188, 1196 (9th Cir. 2013), that a plaintiff may prevail on a claim of retaliatory arrest "even if the officers had probable cause to arrest." Pet. App. 4-5. The court therefore held that the existence of probable cause to arrest Bartlett did not, on its own, defeat his retaliatory arrest claim. Pet. App. 4-6.

Pointing to Bartlett's allegation—uncorroborated by any other witness testimony, audio recording, or video footage—that Sgt. Nieves said after the arrest, "Bet you wish you would have talked to me now," the court ruled that a jury might be persuaded that Bartlett was arrested for his earlier refusal to assist with the investigation, rather than for his conduct towards Trooper Weight. Pet. App. 6, 10-12, 36-37. And although the court did not identify any specific evidence suggesting retaliatory motive on Trooper Weight's part, it reversed the grant of summary judgment as to both troopers on the retaliatory arrest claim and remanded for trial. Pet. App. 6.

SUMMARY OF ARGUMENT

This case requires the Court to decide the "elements of the tort" for a First Amendment retaliatory arrest claim in a damages action under 42 U.S.C. § 1983. The sources of authority that guide this inquiry—the Court's own precedents, the common law, and the values of the First Amendment—dictate that a plaintiff must plead and prove the absence of probable cause for the arrest.

I.A. The Court's closest precedent, *Hartman v. Moore*, 547 U.S. 250 (2006), supports a probable cause element for retaliatory arrest claims. In *Hartman* the Court ruled that a plaintiff seeking damages for retaliatory prosecution must plead and prove the absence of probable cause in order to recover. *Id.* at 265-66. This requirement rests on two "details specific to" retaliatory prosecution claims: first, "[t]he requisite causation . . . is usually more complex than it is in other retaliation cases"; second, the presence or absence of probable cause "will always" provide "a

distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation." *Id.* at 261. The same two features exist in retaliatory arrest claims. Retaliatory arrest claims present complex questions of causation. It is often difficult to discern whether an officer considered the suspect's speech for legitimate reasons—*e.g.* as evidence of a threat—or illegitimate ones. The charged circumstances of many arrests and the "split-second decisions" officers are forced to make compound that difficulty. *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1953 (2018). And just as with retaliatory prosecution claims, probable cause has "high probative force" on the difficult question of causation. *Hartman*, 547 U.S. at 265. Making absence of probable cause an element of retaliatory arrest claims thus "makes sense" for the same reasons it does in retaliatory prosecution claims. *Id.* at 265-66.

B. A probable cause element for retaliatory arrest claims is also consistent with the Court's preference for objective tests to govern police conduct and has the benefits that such objective standards offer. Suspects often engage in protected speech "in connection with, or contemporaneously to, criminal activity," *Lozman*, 138 S. Ct. at 1953, often criticizing, challenging, or even just insulting police officers. If an officer knows that her actions will be judged in light of objective facts—rather than a jury's guess as to how she felt about the suspect's speech—she will not hesitate to make reasonable arrests necessary for public safety and order. But if retaliatory arrest claims do not have a probable cause element and instead turn solely on the officer's subjective intent, then officers will be vulnerable to "dubious retaliatory arrest suits" and the

burdens they impose. *Id.* The "powerful evidentiary significance" of probable cause, *Hartman*, 547 U.S. at 261, makes it a reliable tool for distinguishing lawful arrests from unlawful ones without the costs of a purely subjective inquiry.

II. The common law of torts—which the Court looks to when identifying the elements of a cause of action under § 1983, *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 920 (2017)—further supports a probable cause element for retaliatory arrest claims. For the most analogous common law torts—malicious prosecution, malicious arrest, and false imprisonment—probable cause has long been a defense to liability, even when improper motive is alleged. This rule reflected courts' concern that peace officers would be reluctant to enforce the law for fear of lawsuits putting their motives on trial. Given Congress's intent that § 1983 "be construed in the light of common law principles that were well settled at the time of its enactment," *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997), the Court should construe a § 1983 claim of retaliatory arrest to include a probable cause element.

III. Finally, a probable cause element that permits recovery for the arrests most likely caused by retaliatory animus while filtering out those that are not is consistent with the purposes and values of the First Amendment. When high-level officials direct the use of the government's arrest power in a retaliatory attempt to suppress speech "high in the hierarchy of First Amendment values," then there is a "compelling need" for redress via damages action under § 1983. *Lozman*, 138 S. Ct. at 1954-55. But "ad hoc, on-the-spot" arrest decisions made by individual officers, *id.* at

1954, are not a potent tool for suppressing core First Amendment speech, and improper arrests can be deterred and corrected in other ways. A probable cause element that reliably sorts meritorious from meritless claims justly protects the values of the First Amendment.

ARGUMENT

To maintain a damages claim for retaliatory arrest in violation of the First Amendment, a plaintiff must plead and prove the absence of probable cause for the arrest.

"The First Amendment prohibits government officials from retaliating against a person for having exercised the right to free speech." *Lozman v. City of Riviera Beach, Fla*, 138 S. Ct. 1945, 1949 (2018) (citing *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998)). Yet identifying an alleged constitutional violation is "only the threshold inquiry" in a damages action under 42 U.S.C. § 1983, which "creates a 'species of tort liability' " for violation of federal rights. *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 916, 920 (2017). The Court "must still determine the elements of, and rules associated with an action seeking damages" for the alleged violation. *Id.* (citing *Carey v. Piphus*, 435 U.S. 247, 257-58 (1978)). To do so, the Court looks to both its own precedent, *Lozman*, 138 S. Ct. at 1952, and the common law, "attend[ing] to the values and purposes of the constitutional right at issue," *Manuel*, 137. S. Ct. at 921. These sources of authority require that a plaintiff pursuing a § 1983 damages claim of retaliatory arrest against individual officers plead and prove that the officers lacked probable cause to make the arrest.

I. The Court's precedents support a probable cause element for § 1983 retaliatory arrest claims.

The Court's closest precedents support imposing a probable cause element in retaliatory arrest suits against individual officers. Requiring proof that probable cause was lacking addresses the particular "complexity of proving (or disproving) causation in these cases," filtering strong cases from weak while protecting society's interest in effective law enforcement against "dubious retaliatory arrest suits," *Lozman*, 138 S. Ct. at 1953, 1954.

"[T]wo major precedents" govern First Amendment retaliation claims. *Id.* at 1952. The first, *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), held that to prevail on a retaliation claim, a plaintiff must show that his protected speech was the "but-for" cause of the allegedly retaliatory government action. *Mount Healthy* involved a public school teacher's claim that the school district declined to renew his contract in retaliation for his criticizing school district policies on a local radio station. *Id.* at 281-82. The school district was found liable for damages because the teacher's speech on a matter of public concern "played a substantial part" in the district's decision not to rehire him, even though there were other legitimate grounds for the decision. *Id.* at 284. But this Court reversed, ruling that the proper test for causation in a retaliation case is whether the employer "would have reached the same decision . . . even in the absence of protected conduct." *Id.* at 287.

In the other major decision, *Hartman v. Moore*, 547 U.S. 250 (2006), the Court decided that a plaintiff pursuing a specific type of First Amendment retaliation claim—retaliatory prosecution—must show more than just but-for causation. *Id.* at 265-66. At issue in *Hartman* was a businessman's claim that U.S. Postal Service inspectors persuaded federal prosecutors to bring criminal charges against him in retaliation for his lobbying Congress to change the Postal Service's policies. *Id.* at 252-54. The Court ruled that a plaintiff pursuing a retaliatory prosecution claim must plead and prove the absence of probable cause to bring the criminal charges. *Id.* at 265-66.[3] Absence of probable cause is an essential element of retaliatory prosecution claims because its "high probative force" can overcome the difficulty of establishing causation, which is "usually more complex than it is in other retaliation claims." *Id.* at 261, 265.

Given the "close relationship between retaliatory arrest and prosecution claims," *Reichle v. Howards*, 566 U.S. 658, 667 (2012), the Court has twice faced the question "whether in a retaliatory arrest case the *Hartman* approach should apply, thus barring a suit where probable cause exists, or, on the other hand, the inquiry should be governed only by *Mt. Healthy*." *Lozman*, 138 S. Ct. at 1954; *Reichle*, 566 U.S. at 670 (ruling that right to be free from arrest supported by probable cause but resulting from retaliatory motive

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[3] Although the claim in *Hartman* was brought against federal officials under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), the Court's analysis applies equally to claims under § 1983. *See Hartman*, 547 U.S. at 259 (describing the causation standards for "a *Bivens* (or § 1983) plaintiff" alleging First Amendment retaliation).

was not "clearly established" and granting qualified immunity to arresting officers). This past term, in *Lozman v. City of Riviera Beach, Florida*, 138 S. Ct. 1945, the Court declined to answer that question broadly and instead ruled only on the "unique class of retaliatory arrest claims" presented by the facts of that case: claims involving an arrest stemming from an alleged municipal policy of retaliation. *Id.* at 1954. For this subset of retaliatory arrest claims, the Court ruled that *Mt. Healthy* is the correct standard. *Id.* at 1955.

Yet for the "mine run of arrests made by police officers," *id.* at 1954, *Hartman* is the better rule. In everyday arrests, particularly those "when speech is made in connection with, or contemporaneously to, criminal activity," it is far more difficult to establish whether retaliatory animus caused an arrest than in ordinary retaliation cases. *Lozman*, 138 S. Ct. at 1953-54. The existence or absence of probable cause has "high probative force" on that difficult question, so "it makes sense to require" a showing of no probable cause "as an element of a plaintiff's case." *Hartman*, 547 U.S. at 265-66. Doing so would also be consistent with the Court's preference for objective tests in judging police officers' conduct, which promote evenhanded law enforcement, protect officers from frivolous litigation, and provide courts with consistent and reliable standards by which to judge officers' conduct.

A. The logic of *Hartman*'s probable cause element for retaliatory prosecution claims applies to retaliatory arrest claims.

The two distinct features of retaliatory prosecution claims that led the Court in *Hartman* to make the absence of probable cause an "element[] of the tort" also exist in retaliatory arrest claims. *Hartman*, 547 U.S. at 265. The complexity of determining causation, and the "powerful evidentiary significance" of probable cause in that determination, *Id.* at 261, both justify requiring the same probable cause element for these claims.

The Court in *Hartman* made showing an absence of probable cause an "element[] of the tort" of retaliatory prosecution because proving causation is more difficult than in "ordinary retaliation claims." *Id.* at 259, 265. In retaliatory prosecution claims, that complexity is a function of the prosecutor's special status. Because prosecutors have absolute immunity from suit, a retaliatory prosecution claim targets the investigators on the theory that their retaliatory animus caused the prosecutor to bring charges. *Id.* at 262 (citing *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976)). Thus to prevail, a plaintiff must establish a causal connection "between the retaliatory animus of one person and the action of another" that overcomes the presumption that the prosecutor had legitimate grounds to bring the charges. *Id.* at 262-63.

"The connection, to be alleged and shown, is the absence of probable cause." *Id.* at 263, 265. As the Court explained, the absence of probable cause "will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the

prosecution," while the existence of probable cause "will suggest that prosecution would have occurred even without a retaliatory motive." *Id.* at 261. The Court thus concluded that "[b]ecause showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case." *Id.* at 265-66.

In *Lozman* the Court recognized the "undoubted force" in the argument that "just as probable cause is a bar in retaliatory prosecution cases, so too should it be a bar" against claims of retaliatory arrest against individual arresting officers. 138 S. Ct. at 1953. But that case presented a unique retaliatory arrest claim because the plaintiff alleged that his arrest stemmed from an official municipal policy of intimidation in retaliation for his protected speech. The Court reasoned that in the specific subset of retaliatory arrest claims like that one—alleging an "official policy [of] retaliation for prior, protected speech bearing little relation to the criminal offense"—the "causation problem" is "not of the same difficulty" as in the typical retaliatory arrest case. *Id.* at 1954. The Court relied on this distinction to conclude that the *Mt. Healthy* framework is appropriate for the "unique class" of retaliatory arrest claims involving allegations of an official retaliatory policy while declining to address the elements of a retaliatory arrest claim "in other contexts." *Id.* at 1955.

1. Retaliation claims arising out of the typical arrest pose substantial causal complexity that justifies a probable cause element like the one adopted in *Hartman*. Like retaliatory prosecution claims, typical "retaliatory arrest cases . . . present a tenuous causal

connection between the defendant's alleged animus and the plaintiff's injury." *Reichle*, 566 U.S. at 668.

In some arrests, determining causation will be difficult for the same reason it is in retaliatory prosecution claims: establishing a connection "between the retaliatory animus of one person and the action of another." *Hartman*, 547 U.S. at 262. Arrests often involve more than one officer. So even if there is evidence of retaliatory animus for one officer, the factfinder must figure out the role that animus might have played in the other's decision to arrest. That problem exists here. Bartlett advances distinct theories of retaliatory animus against each officer, stemming from separate encounters. Sgt. Nieves, he maintains, was motivated by Bartlett's earlier unwillingness to speak with him. J.A. 257, 262. Trooper Weight, on the other hand, was allegedly motivated by Bartlett's later speech challenging his authority. J.A. 270, 299. If the jury finds retaliatory animus only on the part of Trooper Weight, then it must determine not only whether it was the but-for cause of the push, but also what role the push played in the decision to arrest. Would Sgt. Nieves have decided to arrest Bartlett had he not seen a fellow trooper push him away? Conversely, if the jury finds that only Sgt. Nieves was motivated by animus, it will have to decide whether Trooper Weight would have followed up the push with an arrest had Sgt. Nieves not been there to take the lead in corralling Bartlett. Disentangling the different theories of motive and causation will be a difficult task for the factfinder.

In other arrests, causal complexity exists for another reason: speech often plays a legitimate role in an officer's decision whether to arrest someone. "[T]he connection between alleged animus and injury may be weakened in the arrest context by a police officer's wholly legitimate consideration of speech." *Id.* Unlike most "ordinary" retaliation claims, where the defendant must show that his reasons for demoting an employee or declining to renew a contract are entirely separate from the plaintiff's speech, in retaliatory arrest claims the plaintiff's speech will often be a legitimate factor in the decision to arrest.

This case perfectly illustrates how "[t]he content of the suspect's speech might be a consideration in circumstances where the officer must decide whether the suspect . . . may present a continuing threat." *Lozman*, 138 S. Ct. at 1953. Bartlett's speech, combined with his conduct, could reasonably lead an officer to believe that Bartlett intended to prevent the officers from doing their jobs—by force if necessary. Trooper Weight testified that Bartlett commanded him to "get out of here" and insisted that Weight not speak to the teen. J.A. 172. Bartlett's responses showed unwillingness to accept Trooper Weight's explanation of what he was doing: "He was very adamant and it was obvious to me that it didn't matter what I had to say." J.A. 172. Sgt. Nieves explained how his earlier interaction with Bartlett—in which Bartlett began "yelling . . . I don't want to talk to you . . . you need to get out of here if you're done"—informed his judgment that Bartlett was aggressive and unreasonable when confronting Trooper Weight. J.A. 142, 188. Officers can reasonably rely on a person's expressions of hostility and challenges to authority, when combined with

agitation and aggressive physical posture, to conclude that the person "pose[s] an immediate threat." *Reichle*, 566 U.S. at 672 (Ginsburg, J., concurring). This sort of rational assessment "should not expose [officers] to claims for civil damages." *Id.* Yet it is easy for a plaintiff to allege it was the officer's affront at being challenged—not his perception of threat—that motivated the arrest. And it is difficult for a factfinder "to discern whether an arrest was caused by the officer's legitimate or illegitimate consideration of speech." *Lozman*, 138 S. Ct. 1953 (citing *Reichle*, 566 U.S. at 688).

The content of a suspect's speech can legitimately support an officer's decision to arrest for a variety of other reasons too, even as the circumstances will often raise a speculative but plausible inference of retaliation:

- Speech can warn of a risk of danger to the public. *Cf. Kilpatrick v. United States*, 432 Fed. App'x 937, 939 (11th Cir. 2011) (holding that officers had arguable reasonable suspicion to detain a person driving a van with anti-ATF messages through a federal building parking lot on the anniversary of the Waco fire and Oklahoma City bombing). Yet a suspect can plausibly allege that an arresting officer was motivated by animus toward the content of unpopular speech challenging authority.

- Speech can evince a "guilty state of mind." *District of Columbia v. Wesby*, 138 S. Ct. 577, 587-88 (2018) (concluding that a suspect's "nervous, agitated, and evasive" responses to police questioning supported probable cause). An

officer may reasonably infer from a person's hostile response to questioning, combined with other suspicious conduct, that he may be guilty of committing the crime in question. Yet a suspect can plausibly allege—as Bartlett does in this case—that the arrest was retaliation for the suspect's hostility. J.A. 257, 262, 270, 299.

- Speech can indicate an intent to persist in unlawful conduct. Thus an officer could reasonably conclude from a trespasser's sign that he would not be persuaded by a request to move along. *Cf. Dukore v. District of Columbia*, 799 F.3d 1137, 1143 (D.C. Cir. 2015) (noting that the identification of a person's tent with the "Occupy D.C." movement—"the purpose of which was use of the tent for the 'physical occupation' of protest sites"—supported probable cause to arrest for violation of an ordinance prohibiting establishment of temporary places of abode on public property). And a person's adamant challenge to a court order of eviction would support a reasonable belief that she would not voluntarily leave the premises, supporting a decision to arrest her for trespass. *Morgan v. County of Hawaii*, No. CV 14-00551 SOM-BMK, 2016 WL 1254222, at *1-4, 15 (D. Haw. Mar. 29, 2016). Yet a suspect can plausibly allege that the officer acted on animus towards the content of the protest.

- Speech flaunting criminality might bring a suspect's conduct to the police's attention in the first place. *Wayte v. United States*, 470 U.S. 598, 609-10 (1985) (upholding the government's

> "passive enforcement" policy of prosecuting only those who reported themselves as having failed to register for the Selective Service or who were reported for doing so). And once police are aware, they can validly consider the effect that failing to arrest an outspoken offender might have on others considering whether to break the law. *Id.* at 613 (ruling that the passive enforcement policy was justified in part because "failing to proceed against publicly known offenders would encourage others to violate the law"). So officers at a rowdy public festival could validly consider the danger that a person's vocal refusal to comply with a lawful order might encourage others to do the same, leading the situation to get out of control. Yet a suspect can plausibly allege that he was singled out for being vocal.

Indeed, determining causation in retaliatory arrest claims will be difficult even if the suspect's speech had no connection to the conduct he was arrested for. A possible inference of retaliation will exist almost any time "speech is made . . . contemporaneously to[] criminal activity." *Lozman*, 138 S. Ct. at 1953-54. An arrest could produce a retaliatory arrest lawsuit whenever the suspect insults a police officer, *White v. County of San Bernadino*, 503 Fed. App'x 551, 555 (9th Cir. 2013) (retaliatory arrest claim premised on suspect's cursing at arresting officers); criticizes an officer in the performance of her duties, *Dell'Orto v. Stark*, 123 Fed. App'x 761, 762-63 (9th Cir. 2005) (retaliatory arrest claim premised on criticism of officer for arresting plaintiff's friend)); participates in a protest or rally, *Maidhof v. Celaya*, 641 Fed. App'x 734,

737-38 (9th Cir. 2016) (retaliatory arrest claim premised on decision to arrest protesters trespassing on public property); or sports a controversial bumper sticker, *Kilpatrick*, 432 Fed. App'x at 939-40 (retaliatory arrest claim premised on anti-authority messages on plaintiff's van).

The charged circumstances of many arrests only heighten the difficulties of establishing causation in retaliatory arrest cases. Unlike an employment retaliation case, for example, in a retaliatory arrest case there usually will be no paper trail of annual performance evaluations and email exchanges from which to glean an officer's true motives. And the plaintiff and defendant likely will not have a long history of interactions—reinforced by observations of coworkers in a relatively calm workplace setting—to guide the jury to reliable conclusions about motive and causation. Instead, the jury in a retaliatory arrest case will often have to rely on only a few witnesses' memories of a tense, adrenaline-fueled encounter to divine a police officer's subjective motive for making the arrest. So it is in this case. No one's recollection of the encounter between Bartlett and the troopers matches exactly what was captured on video, which is unsurprising given how rapidly and unpredictably arrests often unfold.[4] And a plaintiff in a § 1983 case

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[4] For example, the troopers' police reports from the incident state that Bartlett attempted to swing a fist and to head-butt Sgt. Nieves. J.A. 16-17 The video footage does not show any punch being thrown, yet it does show that as Sgt. Nieves grabbed Bartlett, Bartlett clenched his fist and swung his arm around in a way that could look like an incipient punch. Resp. App. Disk 2. And while the video does not show a head-butt, it shows Bartlett resisting the takedown by arching his head and neck against

can use such small discrepancies in the police's recollection of events to create an inference of retaliatory motive—as Bartlett does here by asserting that the police exaggerated the level of threat he posed as cover for their retaliatory actions. J.A. 32.

The Ninth Circuit's rejection of a probable cause element overlooks all these difficulties. In *Skoog v. County of Clackamas*, the Ninth Circuit focused narrowly on the facts of the particular claim before it and reasoned that because it did "not involve multi-layered causation as did the claim in *Hartman*," the case presented an "ordinary retaliation claim" that did not warrant *Hartman*'s probable cause element. 469 F.3d 1221, 1234 (2006). Yet neither *Skoog* nor the circuit court's later decisions (which treat *Skoog* as applying to all retaliatory arrest claims) considered that many retaliatory arrest cases do feature some combination of multi-layer causation, the difficulty of discerning whether the officer considered speech for legitimate or illegitimate reasons, and "split-second judgments," *Lozman*, 138 S. Ct. 1953, that make resolving disputed questions about subjective intent especially difficult. *See Ford v. City of Yakima*, 706

Trooper Weight's hands, which could have looked to Trooper Weight like Bartlett was trying to slam his head back into Sgt. Nieves, standing behind him. Resp. App. Disk 1; J.A. 421. On the other side, in Bartlett's initial account of the encounter (an affidavit in his criminal case), he asserted that Trooper Weight "shov[ed] me to the ground." J.A. 529. Bartlett's friend Krack also testified in his deposition that Trooper Weight's push caused Bartlett to land on his knee. J.A. 202. Yet the video shows, and the district court specifically found, that Bartlett remained standing after the push and only went to the ground after being forced down several moments later by the troopers. Pet App. 12; Resp. App. Disk 1.

F.3d 1199, 1194 & n.2 (9th Cir. 2013); *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 901 & n.5 (9th Cir. 2008); *Beck v. City of Upland*, 527 F.3d 853, 864 n.12 (9th Cir. 2008); *Skoog*, 469 F.3d at 1234-35.

2. A probable cause element overcomes that difficulty. In retaliatory arrest claims, just as in retaliatory prosecution claims, probable cause is a "potential feature of every case, with obvious evidentiary value" on the most challenging question: what was the true cause of the arrest? *Hartman*, 547 U.S. at 265. "Demonstrating that there was no probable cause for the [arrest] will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for" the arrest, "while establishing the existence of probable cause will suggest that the [arrest] would have occurred even without a retaliatory motive." *Id.* at 261. The inquiry into probable cause takes into account "the events which occurred leading up to the [arrest], and . . . whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to . . . probable cause." *Ornelas v. United States*, 517 U.S. 690, 696 (1996). The best indicator of what the officer would have done absent retaliatory motive is whether "the known facts and circumstances are sufficient to warrant a [person] of reasonable prudence in the belief" that an arrest would be appropriate. *Id.*

Particularly when law enforcement officers must make "singularly swift, on the spot" decisions involving the safety others or themselves, *Reichle*, 566 U.S. at 671 (Ginsburg, J. concurring), it is reasonable to infer that an officer would—and should—have arrested a suspect if it was reasonable to believe he "posed an

immediate threat" to the public safety. *Id.* at 672. Given the strong link between probable cause and the decision to arrest, even the Ninth Circuit has conceded that probable cause "undoubtedly 'ha[s] high probative force' " in determining whether a law enforcement officer would have made an arrest absent the suspect's exercise of protected speech, *Dietrich*, 548 F.3d at 901 (quoting *Hartman*, 547 U.S. at 265). While probable cause is "not necessarily dispositive," *Hartman*, 547 U.S. at 265, it nonetheless serves as the most reliable indicator of whether an officer's retaliatory motive prompted the arrest. "Because showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require" that showing as an element of the tort of retaliatory arrest—just as it does for retaliatory prosecution claims. *Id.* at 265-66.

B. The Court's preference for objective tests to govern police officers' conduct supports a probable cause element for retaliatory arrest claims.

Requiring a probable cause element for retaliatory arrest claims is consistent with the Court's preference for objective tests to judge the constitutionality of police officers' conduct. "[O]bjective standards of conduct" promote "evenhanded law enforcement," *Kentucky v. King*, 563 U.S. 452, 464 (2011) (quoting *Horton v. California*, 496 U.S. 128, 138 (1990)), and protect against judicial "expedition[s] into the minds of police officers," *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984). Those considerations apply with special force to

retaliatory arrest claims. Because it is easy to allege improper motive and difficult to prove or disprove causation in these cases, officers are especially vulnerable to "dubious retaliatory arrest suits," *Lozman*, 138 S. Ct. at 1953, that distract them from their jobs and deter them from making justified arrests.

1. The Court generally "reject[s] . . . subjective inquiries" when delineating rules for law enforcement. *Michigan v. Bryant*, 562 U.S. 344, 360 n.7 (2011). For example, to establish a claim of false arrest in violation of the Fourth Amendment, a plaintiff must demonstrate that the arrest was objectively unreasonable by showing a lack of probable cause. *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004). "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren v. United States*, 517 U.S. 806, 813 (1996). Even in situations that might invite greater abuse of law enforcement power, the Court has rejected subjective inquiries into officer motivation. When courts must determine whether an officer relied in good faith on an invalid warrant, the "good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal." *Leon*, 468 U.S. at 919-21, 922 n.23. And although the Court recognized the possibility that moving violations can easily be used to justify pretextual traffic stops based on unlawful motives, it rejected a special Fourth Amendment test for traffic stops that was "plainly and indisputably driven by subjective considerations." *Whren*, 517 U.S. at 810, 814. Likewise, the Court uses objective tests that do not depend on the intent of the police to determine whether

an interrogation has occurred and whether it was custodial for Fifth Amendment *Miranda* purposes. *J.D.B. v. North Carolina*, 564 U.S. 261, 270-71 (2011); *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). And in the Sixth Amendment context, the Court employs an objective test to determine whether an emergency existed for the purposes of the Confrontation Clause. *Bryant*, 562 U.S. at 360, 361 n.8.

Even when an officer's motive is an essential element of a claim, the constitutional analysis does not turn solely on an inquiry into the officer's subjective intent. To prove discriminatory or selective prosecution in violation of the Equal Protection Clause, a plaintiff must satisfy both a subjective and an objective element: she "must demonstrate [both] that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.' " *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)). The objective prong—discriminatory effect—may be established by showing that similarly situated persons "could have been prosecuted, but were not," for the same offense. *Armstrong*, 517 U.S. at 465, 469. This standard has been extended to other types of selective enforcement claims—including arrests, fines, and traffic stops—in nearly every circuit. *See, e.g.*, *Alexis v. McDonald's Restaurants of Massachusetts, Inc.*, 67 F.3d 341, 353–54 (1st Cir. 1995); *LaTrieste Rest. & Cabaret Inc. v. Vill. of Port Chester*, 40 F.3d 587, 590, 592 (2d Cir. 1994); *Startzell v. City of Philadelphia, Pennsylvania*, 533 F.3d 183, 191 (3d Cir. 2008); *Stout v. Vincent*, 717 F. App'x 468, 471 (5th Cir. 2018); *Stemler v. City of Florence*, 126 F.3d 856, 872 (6th Cir. 1997); *Marcavage v. City of Chicago*, 659 F.3d

626, 631–32 (7th Cir. 2011); *Johnson v. Crooks*, 326 F.3d 995, 999–1000 (8th Cir. 2003); *Richards v. City of Los Angeles*, 261 F. App'x 63, 65-66 (9th Cir. 2007); *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1166 (10th Cir. 2003); *Rylee v. Chapman*, 316 F. App'x 901, 907 (11th Cir. 2009).

And of course, the Court adopted an "objective fact requirement" for the motive-based constitutional tort of retaliatory prosecution. 547 U.S. at 258. Although the *Hartman* decision did not involve police officers in the field, its rationale rested in part on the need to protect the essential law enforcement interests embodied in the "presumption of regularity accorded to prosecutorial decisionmaking." *Hartman*, 547 U.S. at 263. The Court's reluctance to inquire into prosecutors' decisions stems from the danger that doing so will "chill law enforcement" and "undermine prosecutorial effectiveness." *Armstrong*, 517 U.S. at 465 (quoting *Wayte*, 470 U.S. at 607). Reasoning that "judicial intrusion into executive discretion of such high order should be minimal," the Court in *Hartman* was not willing to permit retaliatory prosecution claims—which necessitate an inquiry into the prosecutor's motivation for bringing charges—without an "objective fact requirement" creating a strong inference of causation. *Hartman*, 547 U.S. at 258, 263-64 (citing *Wayte*, 470 U.S. at 607-08). Just as the Court has rejected a purely subjective inquiry for other motive-based claims involving law enforcement interests, it should reject a purely subjective inquiry for retaliatory arrest claims as well.

2. Eschewing purely subjective standards for police officers' conduct serves important societal interests. "[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *King*, 563 U.S. at 464. Because "the balancing of the competing interests" in the law enforcement context "must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers," the Court has expressed a "general preference to provide clear guidance to law enforcement through categorical rules." *Riley v. California*, 134 S. Ct. 2473, 2491–92 (2014) (quoting *Michigan v. Summers*, 452 U.S. 692, 705 n.19 (1981)).

Adopting a probable cause element for retaliatory arrest claims ensures that officers can protect public safety without fear that a suspect's protected speech will give rise to a difficult-to-defend lawsuit. Officers need to make "split-second judgments" "in circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). Officers confronted with the type of situation that led to Bartlett's arrest, "where spontaneity rather than adherence to a police manual is necessarily the order of the day," may necessarily "act out of a host of different, instinctive, and largely unverifiable motives." *New York v. Quarles*, 467 U.S. 649, 656 (1984). Indeed, "given the complex dynamic between legitimate assessments of harm and illegitimate attitudes toward opinions," Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 440 (1996) (discussing the complexity of determining

motive in the First Amendment legislative context), the arresting officer herself may not know the extent to which some amount of impermissible animus influences her read of the situation. But when an officer is faced with a threat to public safety, the law should not discourage her from acting decisively. Police officers should be able to enforce the law knowing that their actions will be judged according to objective standards.

This case offers a useful illustration of the dilemma that officers will face if their conduct is judged by a jury's guess at their subjective intent. Trooper Weight and Sgt. Nieves believed not only that Bartlett was going to interfere with their investigation, but that he was intoxicated and aggressive. J.A. 140-41, 150-51, 157. Had the troopers known that arresting him would spiral into a trial on a retaliatory arrest claim, they might have declined to do so, even though it was reasonable under the circumstances. Yet that would have meant leaving a drunk, belligerent man at a remote outdoor party in the middle of the night. That is not the kind of decision that society or the courts should encourage officers to make. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 351 (2001) (declining Fourth Amendment rule that "would come at the price of a systematic disincentive to arrest in situations where . . . arresting would serve an important societal interest"). If the Court rules that probable cause does not bar retaliatory arrest claims, this dilemma is likely to arise in countless routine encounters involving simple assault, disorderly conduct, trespass, or other minor offenses that sometimes pose a danger to public safety.

Using objective standards also promotes the "strong public interest in protecting public officials from the costs associated with the defense of damages actions." *Crawford-El*, 523 U.S. at 590. In any retaliation case "an official's state of mind is easy to allege and hard to disprove," making even "insubstantial claims . . . less amenable to summary disposition than other types of claims against government officials." *Id.* at 584-85 (internal quotations omitted). This problem is all the more vexing in retaliatory arrest cases because of the proximity of protected speech and actionable conduct, the often legitimate role that speech plays in the decision to arrest, and the charged circumstances in which most arrests take place.

Forcing officers to litigate the good faith of their actions imposes "substantial costs." *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982). When an officer's subjective intent is at issue, "there often is no clear end to the relevant evidence," exposing the officer and her employer to "broad-ranging discovery and the deposing of numerous persons, including [the officer's] professional colleagues." *Id.* at 817. These inquiries are "peculiarly disruptive of effective government." *Id.* Even more concerning is "the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible . . . in the unflinching discharge of their duties." *Id.* at 814 (internal quotations omitted).

Without an "objective fact requirement" like probable cause, these costs will be incurred even for insubstantial claims. This is the result in the Ninth Circuit, with its rule that probable cause does not bar a retaliatory arrest claim:

- *Mam v. City of Fullerton*, No. 8:11–cv–1242–JST (MLGx), 2013 WL 951401 (C.D. Cal. 2013). An officer arrested the plaintiff after he repeatedly disobeyed orders to back up while police attempted to break up a fight. The district court held that the officer had probable cause to arrest him for willful obstruction of a peace officer. *Id.* at *3–4. It nonetheless denied summary judgment as to the plaintiff's retaliatory arrest claim because it believed that a jury could find officers arrested him because he was exercising his right to videotape the police. The case was not "close"—after an eight-day trial "the jury spent only approximately two hours deliberating before reaching a unanimous verdict." No. SACV 11-1242-JLS (MLGx), 2014 WL 12573550, at *3 (C.D. Cal. July 24, 2014).

- *Morse v. San Francisco Bay Area Rapid Transit District*, No. 12–cv–5289 JSC, 2014 WL 572352 (N.D. Cal. Feb. 11, 2014). The plaintiff, an online journalist, had a long history of criticizing and attending protests of the local transit system. *Id.* at *1. During a protest, the plaintiff joined others in blocking fare gates. *Id.* at *14. Police arrested him because he was an "active participant," "marching . . . around the ticket vendors, blocking fare gates, [and] impeding the flow of patrons." *Id.* at *6. The district court held that the arrest was supported by probable cause, but sent his retaliation claim to the jury because of his earlier speech and his allegation that the police treated him differently from other participants. *Id.* at *9-11. After a four-day trial, the jury found that the plaintiff's speech "was

[not] a 'but for' cause" of his arrest. ECF 119, No. 12-cv-05289.

- *Holland v. City of San Francisco*, No. C10–2603 TEH, 2013 WL 968295 (N.D. Cal. Mar. 12, 2013). At a protest, a woman challenged officers for arresting her girlfriend and repeatedly disobeyed lawful orders by the police to stand back. While standing close to the officers she made physical contact with them, and they arrested her. *Id.* at *1. The court concluded that the officers had probable cause to arrest her but had to face trial on her retaliatory arrest claim because one could infer that the protester "would not have been arrested" but for "her persistent questioning of the officers and verbal challenges to their authority." *Id.* at *3, *5. After a five-day jury trial held three years after the protester filed her complaint, the jury found that the defendants had not "retaliated against her in violation of her First Amendment rights." ECF 168, No. 10-cv-2603.

- *Eberhard v. California Highway Patrol*, No. 3:14-cv-01910-JD, 2015 WL 6871750 (N.D. Cal. Nov. 9, 2015). The plaintiff covered a controversial construction project for a local newspaper. During a protest, police arrested him for trespass because he was in an area of the site "fenced off from the public" and "marked off by no trespassing signs," and he lacked the escort that he needed to be at the site. *Id.* at *4. The court nonetheless allowed his retaliation claim to go to the jury, because he alleged (among other things) that the officers knew he

> was a journalist, knew he was onsite to cover the protest, knew he had criticized the Highway Patrol, and had made comments about prior incidents between the plaintiff and the police. *See id.* at *7. Two years after the plaintiff filed his complaint, the jury unanimously determined that the officer had not "violated [his] First Amendment rights." ECF 275, No. 14- cv-1910.

In light of outcomes like these, the Ninth Circuit has recognized that summary judgment is not up to the task of "protecting government officials from the disruption caused by unfounded claims." *Dietrich*, 548 F.3d at 901. For that reason the Ninth Circuit has altered the standard for summary judgment in retaliatory arrest claims by adding a rule of thumb to guide the district courts: cases with "very strong evidence of probable cause and very weak evidence of a retaliatory motive" should ordinarily result in summary judgment. *Id.* (cited in *Maidhof*, 641 F. App'x at 735; *White*, 503 F. App'x at 553).

But the Ninth Circuit's solution is not only the kind of procedural improvisation that "lacks any common-law pedigree" or "precedential grounding," *Crawford-El*, 523 U.S. at 594-95, it does not work very well, either. The imprecise weighing it requires necessarily turns on the diverse perspectives of individual judges about what evidence of probable cause counts as "very strong," what evidence of retaliatory motive counts as "very weak," and how to balance those categories of evidence against one another. *E.g., compare Maidhof*, 641 F. App'x at 736-37 (affirming summary judgment because there was probable cause for arrest and "evidence of retaliatory intent is weak"), *with id.* at 737

(Rawlinson, J., dissenting) (finding sufficient "circumstantial evidence of retaliation" to preclude summary judgment); *compare White*, 503 F. App'x at 553 (affirming summary judgment because the evidence of retaliatory motive for a pat-down search was "weak") *with id.* at 555 (Graber, J., dissenting) (maintaining that there was sufficient evidence for fact-finder to conclude that pat-down search was motivated by the plaintiff's insult). The Ninth Circuit's standard invites inconsistent results and so provides only scattershot protection against unfounded claims. By contrast, an objective element like probable cause—which aptly screens meritless claims from meritorious ones—is far more judicially manageable and consistent with this Court's decisions articulating the constitutional standards governing officers' conduct.

3. An objective test—though imperfect like any other test—is preferable to the alternative of litigating an officer's subjective intent in each of the countless cases when "speech is made in connection with, or contemporaneously to, criminal activity." *Lozman*, 138 S. Ct. 1953-54. Of course, the existence of probable cause is "not necessarily dispositive" of causation, *Hartman*, 547 U.S. at 265, and a probable cause element will occasionally screen out meritorious claims. The same is true whenever an objective standard is used: some actions driven by improper motive will not result in liability.

But as the *Hartman* decision shows, an "objective fact requirement" is a better approach to the "causation concern" that afflicts both retaliatory prosecution and retaliatory arrest claims than the alternative: leaving

the matter to "such pleading and proof as the circumstances allow" in each individual case, with "hassles over the adequacy" of evidence "the predictable result." *Id.* at 258, 264 & n.10. Once a colorable claim of retaliatory motive is put forth, "it is impossible to know whether the claim is well founded until the case has been tried." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.). Given the causal complexity of retaliatory arrest claims, an objective element that has "powerful evidentiary significance" on the issue of retaliatory causation, *Hartman*, 547 U.S. at 261, will likely be at least as reliable in ferreting out improper police action as a test that turns solely on the officer's subjective intent. *See Missouri v. Seibert*, 542 U.S. 600, 626 (2004) (O'Connor, J., dissenting) ("There is no reason to believe that courts can with any degree of success determine in which instances the police had an ulterior motive." (quoting W. LaFave, Search and Seizure § 1.4(e), p. 124 (3d ed. 1996))); *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984) ("[S]ending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources."); *Quarles*, 467 U.S. at 656 (application of a public safety exception to the *Miranda* warning requirement "should not be made to depend on post hoc findings concerning subjective motivation of the arresting officer" acting on "a host of different, instinctive, and largely unverifiable motives").

II. A probable cause element for retaliatory arrest claims is consistent with the weight of authority at common law.

The other main guide to determining the elements of a constitutional tort—the common law—supports a probable cause element too. In the common-law torts most analogous to a claim of First Amendment retaliatory arrest, a finding of probable cause for the arrest bars recovery. The practice and wisdom of common law courts should lead this Court to apply a similar rule to retaliatory arrest claims.

In defining the "contours and prerequisites of a § 1983 claim" premised on an alleged constitutional violation, "courts are to look first to the common law of torts." *Manuel*, 137 S. Ct. at 920 (citing *Carey*, 435 U.S. at 257-58). This is because § 1983 creates "a species of tort liability" when someone acting under the color of state law deprives another of a constitutional right, *Imbler*, 424 U.S. at 417, and the Constitution's provisions are "framed in the language of the English common law, and are to be read in the light of its history." *Smith v. State of Alabama*, 124 U.S. 465, 478 (1888). The common law may be more a "source of inspired examples than of prefabricated components" for constitutional torts under § 1983. *Hartman*, 547 U.S. at 258. Yet the Court heeds the common law's example when "identifying both the elements of the cause of action and the defenses available to state actors" under § 1983 because "Congress intended the statute to be construed in light of common law principles that were well settled at the time of its enactment." *Kalina v. Fletcher*, 522 U.S. 118, 123

(1997) (citing *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Briscoe v. LaHue*, 460 U.S. 325, 330 (1983)).

At the time of § 1983's enactment, there was no common-law tort for retaliatory arrest in violation of the freedom of speech. *Lozman*, 138 S. Ct. at 1957 (Thomas, J., dissenting) (citing *Hartman*, 547 U.S. at 259). In past cases where an offense did not exist at common law, this Court has looked to the common-law causes of action that provide the "closest analogy." *Heck v. Humphrey*, 512 U.S. 477, 484 (1994). Here, the three arrest-based torts that existed at common law—malicious prosecution, malicious arrest, and false imprisonment—provide that analogy. *Lozman*, 138 S. Ct. at 1957 (Thomas, J., dissenting).

At common law, probable cause defeated malicious prosecution and malicious arrest claims, and a great majority of states and authorities held that probable cause defeated false imprisonment claims as well. Malicious prosecution and malicious arrest consisted of using the criminal law out of an "evil motive," *Wheeler v. Nesbitt*, 65 U.S. 544, 550, 24 How. (1860)—including a motive of retaliating against speech, *Stoecker v. Nathanson*, 98 N.W. 1061, 1061 (Neb. 1904) (involving allegation that plaintiff was arrested for being "too mouthy"). Bringing these claims at common law required proving a lack of probable cause to make the arrest. *See, e.g., Wheeler*, 65 U.S. at 550 ("Want of reasonable and probable cause is as much an element in the action for a malicious criminal prosecution as the evil motive which prompted the prosecution to make the accusation . . . ."); *Ahern v. Collins*, 39 Mo. 145, 150 (1866) (noting that "want of probable cause" is a "necessary ingredient[]" in both malicious prosecution

and malicious arrest claims); *Cardival v. Smith*, 109 Mass. 158, 158 (1872) (observing it "well settled" that a want of probable cause must be proved in an action for malicious arrest or prosecution). Even if an officer had a nefarious motive for arresting someone, the existence of probable cause for the arrest defeated a malicious arrest or prosecution claim. *See Crescent City Livestock Co. v. Butchers' Union Slaughter-House Co.*, 120 U.S. 141, 149 (1887) ("If he had probable cause to institute his action, the motives by which he was activated . . . are not material.").

Probable cause usually defeated a claim of false imprisonment at common law too. False imprisonment is the tort of confining a person against her will without legal justification. *Wallace v. Kato*, 549 U.S. 384, 388-89 (2007) (citing M. Newell, Law of Malicious Prosecution, False Imprisonment, and Abuse of Legal Process § 2, p. 57 (1882) (footnotes omitted)). False imprisonment claims could be brought against private citizens or peace officers, but the tort gave special protection to peace officers. *Hawley v. Butler*, 54 Barb. 490, 493 (N.Y. 1868). Although private citizens were always liable for false imprisonment if the arrestee had not actually committed a felony, the law excused peace officers if they had based the arrest on "reasonable grounds of belief" (i.e., probable cause) that the arrestee had done so. *Lozman*, 138 S. Ct. 1945, 1957 (Thomas, J., dissenting) (citing T. Cooley, Law of Torts 175 (1880); 2 C. Addison, Law of Torts § 803, p.18 (1876); 1 F. Hillard, The Law of Torts of Private Wrongs § 18, pp. 207-08 & n. (a) (1866)).

Accordingly, most courts held that probable cause defeated a common law false imprisonment claim. *E.g.*, *Hawley*, 54 Barb. at 492-93 ("The absence of probable cause was always . . . a necessary declaration."); *Fagan v. Pittsburgh Terminal Coal Corp.*, 149 A. 159, 163 (Pa. 1930) ("Whether guilty or not, if there was probable cause for arresting the plaintiff, the act of the officer would be justified."); *Dir. Gen. of Railroads v. Kastenbaum*, 263 U.S. 25, 27-28 (1923). In 38 states and the District of Columbia, probable cause is either a bar to false imprisonment cases[5] or an affirmative defense.[6] As in malicious prosecution cases, probable

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[5] *Upshaw v. McArdle*, 650 So. 2d 875, 878 (Ala. 1994); *Yi v. Yang*, 282 P.3d 340, 345 n.7, 347 (Alaska 2012); *Beebe v. De Baun*, 8 Ark. 510, 510 (1848); *Rose v. City & Cty. of Denver*, 990 P.2d 1120, 1123 (Colo. App. 1999); *Beinhorn v. Saraceno*, 582 A.2d 208, 210 (Conn. 1990); *Clark v. Alloway*, 170 P.2d 425, 428 (Idaho 1946); *Grainger v. Harrah's Casino*, 18 N.E.3d 265, 276 (Ill. App. Ct. 2014); *Row v. Holt*, 864 N.E.2d 1011, 1016 & n.4 (Ind. 2007); *Peterson Novelties, Inc. v. City of Berkley*, 672 N.W.2d 351, 362 (Mich. Ct. App. 2003); *Johnson v. Morris*, 453 N.W.2d 31, 36 (Minn. 1990); *Adams v. City of Raleigh*, 782 S.E.2d 108, 112 (N.C. Ct. App. 2016); *Thyen v. McKee*, 584 N.E.2d 23, 25 (Ohio Ct. App. 1990); *Delong v. State ex rel. Oklahoma Dept. of Public Safety*, 956 P.2d 937, 939 (Okla. Civ. App. 1998); *Dyson v. City of Pawtucket*, 670 A.2d 233, 239 (R.I. 1996); *McBride v. Sch. Dist. of Greenville Cty.*, 389 S.C. 546, 567-68 (S.C. Ct. App. 2010); *Heib v. Lehrkamp*, 704 N.W.2d 875, 884 (S.D. 2005); *Richards v. O'Connor Managment, Inc.*, No. 01A01-9708-CV-00379, 1998 WL 151392, at *5 (Tenn. Ct. App. Apr. 3, 1998); *Crowell v. Kirkpatrick*, 667 F.Supp.2d 391, 417 (D. Vt. 2009).

[6] *White v. Martin*, 30 Cal. Rptr. 367, 369 (Ct. App. 1963); *McCaffrey v. Thomas*, 56 A. 382, 383 (Del. Super. Ct. 1903); *Minch v. D.C.*, 952 A.2d 929, 937 (D.C. 2008); *Toomey v. Tolin*, 311 So. 2d 678, 680–81 (Fla. Dist. Ct. App. 1975); *Reed v. City & Cty. of Honolulu*, 873 P.2d 98, 109 (Haw. 1994); *Children v. Burton*, 331 N.W.2d 673, 679 (Iowa 1983); *Hill v. Day*, 215 P.2d 219, 224 (Kan. 1950); *Brown v. City of Monroe*, 135 So. 3d 792, 796 (La. Ct. App. 2014); *Jackson*

cause defeated a claim of false imprisonment even if an officer had an "ulterior motive" in making the arrest. Restatement (First) of Torts § 127, cmt. a., illus. 2 (Am. Law Inst. 1934).[7]

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v. Knowlton, 173 Mass. 94, 96–97 (1899); *Kichnet v. Butte-Silver Bow County*, 274 P.3d 740, 745 (Mont. 2012); *State ex rel. Douglas v. Ledwith*, 281 N.W.2d 729, 736 (Neb. 1979); *Farrelly v. City of Concord*, 130 A.3d 548, 560 (N.H. 2015); *Mesgleski v. Oraboni*, 748 A.2d 1130, 1138–39 (N.J. Super. Ct. App. Div. 2000); *State v. Johnson*, 930 P.2d 1148, 1153–54 (N.M. 1996); *Broughton v. State*, 335 N.E.2d 310, 315 (N.Y. 1975); *Haggard v. First Nat. Bank of Mandan*, 8 N.W.2d 5, 15 (N.D. 1942); *Bacon v. City of Tigard*, 724 P.2d 885, 886 (Or. Ct. App. 1986); *Mikelberg v. Philadelphia Rapid Transit Co.*, 16 Pa. D. 906, 907-08 (Pa. Com. Pl. 1907); *Terry v. Zions Coop. Mercantile Inst.*, 605 P.2d 314, 320 (Utah 1979), overruled on other grounds by *McFarland v. Skaggs*, 678 P.2d 298, 304–05 (Utah 1984); *Coles v. McNamara*, 230 P. 430, 432 (Wash. 1924); *Rodarte v. City of Riverton*, 552 P.2d 1245, 1258 (Wyo. 1976).

[7] This section of the Restatement concluded that an arrest by a peace officer is privileged irrespective of motive. The section provides that an arrest is privileged if "the actor makes the arrest for the *purpose* of bringing the other before a court, body, or official or otherwise securing the administration of the law." Rest. (First) Torts § 127 (emphasis added). And the comment distinguishes between an officer's "purpose" in making the arrest and his "motive." *Id.* cmt. a. "Purpose" means "an objective, goal, or end." Black's Law Dictionary (10th ed. 2014). As the examples that follow make clear, an inquiry into purpose entails what was the "end to be attained" from the arrest: to bring the suspect to court, or to achieve some other end like shaking down the suspect for money. *See* Rest. (First) Torts § 127 cmt. a, illus. 2. But the comment notes that if the arrest was for the proper purpose of bringing the suspect before the courts, then the arrest is privileged even if the officer "ha[d] an ulterior *motive* in making it." "Motive" means "something, esp. willful desire, that leads one to act." Black's Law Dictionary (10th ed. 2014). Thus at common law, so long as the officer made the arrest for the end or goal of bringing

The probable cause element in common law false imprisonment, malicious prosecution, and malicious arrest claims had sound justifications. Most importantly, it served the public interest in bringing criminals to justice. *Hogg v. Pinckney*, 16 S.C. 387, 393 (1882); *Brockway v. Crawford*, 3 Jones 433, 437 (N.C. 1856). Courts feared that "ill consequences would ensue to the public, for no one would willingly undertake to vindicate a breach of the public law . . . with the prospect of an annoying suit staring him in the face." *Ventress v. Rosser*, 73 Ga. 534, 541 (1884). And courts understood that such annoying suits would not be exceptions, because "malice might easily be inferred sometimes from idle and loose declarations." *Chesley v. King*, 74 Me. 164, 176 (1882). In such cases, officers would struggle to prove their innocence if they could not rely on the probable cause bar: "litigation would be endless if the motives of those who are simply enforcing a legal claim were made the subjects of inquiry." *Id.* at 175. By giving officers a clear standard to determine whether they could lawfully make an arrest, officers could enforce the law and protect their community without fear of liability, so long as they had probable cause. *Ledwith v. Catchpole*, 2 Cald. 291, 295 (K.B. 1783).

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the suspect to court or "securing the administration of the law," the arrest was privileged regardless of why the officer desired to do so. *See* Rest. (First) Torts § 127 cmt. a, illus. 1. Because there is no allegation that the troopers arrested Bartlett for the purpose of doing something other than bringing him before the courts—*e.g.*, shaking him down for money—the arrest would be privileged at common law.

Because Congress intended § 1983 "to be construed in light of common law principles that were well settled at the time of its enactment," *Kalina*, 522 U.S. at 123, the common law's unwillingness to hold peace officers who had probable cause to arrest liable—whatever their motives—supports a probable cause element for § 1983 retaliatory arrest claims.

III. A probable cause element that filters strong retaliatory arrest claims from weak ones comports with the purposes and values of the First Amendment.

When "defining the contours and prerequisites of a § 1983 claim," "courts must closely attend to the values and purposes of the constitutional right at issue." *Manuel*, 137 S. Ct. at 920-21. A probable cause element—which will permit recovery for the arrests most likely caused by retaliatory animus while filtering out those that are not—is consistent with the values and purposes of the First Amendment.

In tailoring the contours of a § 1983 claim to the values of the constitutional right at issue, the Court need not reject every rule, however logical or salutary, that would make recovery harder for plaintiffs to obtain. Instead, as *Hartman* shows, Court can define the elements of a § 1983 claim alleging violation of the First Amendment in a way that "makes sense" in light of the "details specific to" the tort itself, even if doing so might preclude recovery for meritorious claims in rare instances. *Hartman*, 547 U.S. at 259, 264-66. The *Hartman* case had strong evidence of retaliatory motive (the court of appeals observed that it "came close to the proverbial smoking gun," *Moore v. Hartman*, 388 F.3d 871, 884 (D.C. Cir. 2004)) against speech of the highest

value. *Id.* at 252-54. And the Court recognized the possibility that strong evidence of retaliatory causation would occasionally coexist with probable cause to bring charges. *Id.* at 264. But rather than fashioning a rule based on the most egregious circumstances—which are "likely to be rare and consequently poor guides in structuring a cause of action"—the Court instead "defin[ed] the elements of the tort" with an eye to the typical case. *Id.* The elements of a § 1983 claim need not permit recovery in every case in order to be consistent with the values of the First Amendment.

And the Court is sensitive to "the evils inevitable in any alternative" when determining the contours of a constitutional tort under § 1983. *Crawford-El*, 523 U.S. at 591 (quoting *Harlow*, 457 U.S. at 813-14). With retaliatory arrest claims, this means considering both the "risk that some police officers may exploit the arrest power as a means of suppressing speech" and the risk that "the complexity of proving (or disproving) causation in these cases" will leave officers vulnerable to "dubious retaliatory arrest suits." *Lozman*, 138 S. Ct. at 1953.

The Court considered these competing risks in *Lozman* and deemed the more permissive *Mt. Healthy* standard the correct one for the "unique class" of claims before it—claims involving arrest stemming from official retaliatory policy. *Id.* at 1954-55. For that unique type of retaliatory arrest case, the Court noted both the "high" value of the speech allegedly retaliated against and the "particularly troubling and potent" threat to speech from retaliation by government policymakers, and it concluded that there is a

"compelling need" for redress via damages action when retaliation stems from an official government policy. *Id.* at 1954-55.

But *Lozman* was an unusual retaliatory arrest case; there is a far less compelling need for a damages remedy in the typical case in which an "ad hoc, on-the-spot decision by an individual officer" is alleged to be retaliatory. *Lozman*, 138 S. Ct. at 1954. For such typical cases, a probable cause element that effectively sorts between improper arrests and proper ones adequately protects First Amendment values for two main reasons.

First, an individual police officer's decision to arrest due to retaliatory motive is much less corrosive to First Amendment values than when "the government itself orchestrates the retaliation." *Id.* An official policy of retaliation means that the government has taken sides against ideas or information it dislikes in the hope of eliminating them from the public square. This evil is the core concern of the First Amendment. *Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 548 n.9 (1980) (Stevens, J., concurring) ("[A] value at the very core of the First Amendment [is] the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))). And if the government itself decides to retaliate against a disfavored individual using the arrest power, it has far more resources at its disposal to carry out that plan than an individual officer. For these reasons, an official policy of retaliation is a "particularly troubling and potent form of retaliation"

that creates a "compelling need" for redress via civil damages action, *Lozman*, 138 S. Ct. at 1934.

By contrast, arrest decisions made by individual officers are not so potent a means of suppressing speech. An officer has probable cause to arrest only on the basis of facts "known to the arresting officer at the time of the arrest." *Devenpeck*, 543 U.S. at 152. This limitation makes it difficult for an individual officer to carry out a premeditated plan to target speech that he does not like. There is little danger that an officer will spend time and energy trailing a person whose speech he dislikes in hopes of catching him doing something that creates probable cause to arrest. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 352 (2001) ("[I]t is in the interest of the police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason.").

Nor is there great danger that individual officers can use arrests supported by probable cause to thwart the essential goal of the first Amendment: "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Sullivan*, 376 U.S. at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). The typical retaliatory arrest claim alleges that an officer reacted against speech the suspect made at or near the scene of the arrest. Often the speech in question involves challenges to the officers' authority or simply personal insults. *See, e.g., White*, 503 F. App'x at 555 (basis for retaliatory arrest claim was the suspect's repeated cursing at officers and rhetorical complaint, "Why are you always f—king with me?"); *Morgan*, 2016 WL 1254222, at *19 (basis for retaliatory arrest claim was

the suspect's "loudly challenging officers' directions" to pack up her belongings and vacate a property in compliance with a court order); *Engman v. City of Ontario*, No. ECDV 10-284 CAS (PLAx), 2011 WL 13134048, *1-2 (C.D. Cal. May 23, 2011) (basis for retaliatory arrest claim was the suspect's statement to police that "even [his] father could kick their asses"). To be sure, this kind of "verbal criticism and challenge directed at police officers" is protected by the First Amendment, *City of Houston v. Hill*, 482 U.S. 451, 461 (1987), but it is neither speech on matters of public concern that "occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection," *Connick v. Myers*, 461 U.S. 138, 145 (1983), nor a petition for the redress of grievances that occupies a similarly lofty place, *Lozman*, 138 S. Ct. at 1955; *cf. Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387 (2011) ("[T]he Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for the resolution of legal disputes."). An individual officer's on-the-spot reaction to a personal insult or challenge to his authority is thus unlikely to undermine the free exchange of ideas or "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means." *Sullivan*, 376 U.S. at 269 (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

Second, § 1983 liability is not the only way to deter officers from making retaliatory arrests. Whereas "[a]n official policy . . . can be difficult to dislodge" because it is the decision of those in charge, the improper actions of an individual police officer can be effectively

addressed through internal investigation and discipline. *Lozman*, 138 S. Ct. at 1954 ("A citizen who suffers retaliation by an individual officer can seek to have the officer disciplined or removed from service . . . ."). With the proliferation of smartphones that can record what happens in an arrest, citizens can alert police departments about arrests clearly motivated by retaliatory animus. It is in law enforcement's own interest to address such complaints as they arise and to demonstrate accountability to the public. *Atwater*, 532 U.S. at 353 (noting that "the good sense (and, failing that, political accountability) of most local lawmakers and law-enforcement officials" contributes to "a dearth of horribles demanding redress"). Police departments know that responsiveness to citizen complaints increases trust in law enforcement and is "the key to effective policing." Int'l Ass'l of Chiefs of Police, *Building Trust Between the Police and the Citizens They Serve* 5-7, https://ric-zai-inc.com/Publications/cops-p170-pub.pdf.

And if retaliatory animus among a jurisdiction's police officers proves severe and intractable, damages may be available regardless of probable cause. Should legitimate complaints go unaddressed, or should individual arrests motived by retaliatory animus become a "pervasive" problem in a police force, a plaintiff may obtain relief against a municipality under § 1983 by alleging an official custom or practice of retaliation against disfavored speakers. *Lozman*, 138 S. Ct. at 1954 (citing *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 691 (1978)). A municipality may be liable under § 1983 based on "governmental 'custom' even though such a custom has not received formal approval through the body's official

decisionmaking channels," *Monell*, 436 U.S. at 691, for example based on a pattern of retaliatory arrests in which senior policymakers acquiesce. *See, e.g., Sorlucco v. New York City Police Dep't*, 971 F.2d 864, 871 (2d Cir. 1992) ("[A] § 1983 plaintiff may establish a municipality's liability by demonstrating that the actions of subordinate officers are sufficiently widespread to constitute the constructive acquiescence of senior policymakers."). Under *Lozman*, probable cause does not bar such claims, allowing relief for "troubling and potent" types of retaliation—the sort that may not be effectively addressed through internal or external oversight mechanisms.

But for retaliation claims arising out of the "mine run of arrests," *Lozman*, 138 S. Ct. at 1934, a probable cause element that permits recovery for the arrests most likely caused by retaliatory animus while filtering out those that are not sufficiently protects the values of the First Amendment.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted.

JAHNA LINDEMUTH
Attorney General of Alaska

DARIO BORGHESAN
Counsel of Record
ANNA R. JAY
STEPHANIE GALBRAITH MOORE
1031 W. Fourth Ave.
Suite 200
Anchorage, AK 99501
(907) 269-5100
dario.borghesan@alaska.gov

Counsel for Petitioners

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IN THE

Supreme Court of the United States

LUIS A. NIEVES, ET AL.,

Petitioners,

v.

RUSSELL P. BARTLETT,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENT

Jeffrey L. Fisher
Pamela S. Karlan
Leah M. Litman
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Kerri L. Barsh
GREENBERG TRAURIG
333 S.E. Second Avenue
Miami, FL 33131

Zane D. Wilson
Counsel of Record
Tyler P. Broker
CSG, INC.
714 Fourth Avenue
Suite 200
Fairbanks, AK 99701
(907) 452-1855
zane@alaskalaw.com

QUESTION PRESENTED

When a plaintiff in a Section 1983 damages action claims that a police officer retaliated against his First Amendment-protected expression by arresting him for a misdemeanor, and he presents sufficient evidence from which a jury could find the officer acted with a retaliatory motive, does the existence of arguable probable cause for the arrest bar his claim?

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BRIEF FOR RESPONDENT

Respondent Russell Bartlett respectfully requests that this Court affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

INTRODUCTION

In *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), this Court reiterated that "the First Amendment prohibits government officials from retaliating against individuals for engaging in protected speech" by arresting them for their "expressive activities." *Id.* at 1949, 1954. It rejected the proposition that the presence of probable cause for an underlying arrest serves as an absolute bar to a First Amendment retaliation claim under 42 U.S.C. § 1983. *Lozman*, 138 S. Ct. at 1955.

Petitioners and the United States respond by offering this Court two proposals. Petitioners would permit recovery under Section 1983 against "individual officers" for only the subset of First Amendment violations where plaintiffs can prove a lack of probable cause for the arrest. Petr. Br. 17. The Government suggests a different subset: Plaintiffs can recover damages under Section 1983 for First Amendment violations either where there is a lack of probable cause or where the retaliation stems from an official policy. U.S. Br. 6.

The two proposals are unsupported by statutory text, history, precedent, or practical considerations. This Court should instead affirm the rule the Ninth Circuit applied here: A plaintiff "can prevail on a retaliatory arrest claim even if the officers had probable cause to arrest" if he "prove[s] that the officers' desire to chill his speech was a but-for cause"

of the officers' action, Pet. App. 4, 6 (quoting *Ford v. City of Yakima*, 706 F.3d 1188, 1193 (9th Cir. 2013)).

STATEMENT OF THE CASE

Petitioners and the United States recognize the presence of numerous factual "disputes" concerning the events at issue here. *See, e.g.*, Petr. Br. 5, 7; U.S. Br. 3, 4. Nevertheless, their statements of the case ignore this Court's repeated directive that at the summary judgment stage, the facts must be viewed "in the light most favorable to the nonmoving party"—in this case, respondent. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2017 (2014).

1. Arctic Man is a multiday snowmobile and ski race event that occurs each spring in the Hoodoo Mountains of Alaska. Respondent Russell Bartlett—the son of a retired Alaska State Trooper—attended the 2014 Arctic Man, along with more than 10,000 other spectators.

Alaska State Troopers patrol Arctic Man to ensure public safety. Because of the remoteness of the event and the relatively small patrol force, the commanding officers "don't encourage arrests." J.A. 164. Rather, they are expected to defuse problems they encounter.

Mr. Bartlett spent the event camping out with friends. On the final night, he ate dinner and drank two or three beers at his campsite before walking over to a party at an adjacent campsite later in the evening. J.A. 272, 431.[1]

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[1] Mr. Bartlett weighed approximately 235 pounds, J.A. 147, so the beers he had consumed earlier in the evening did not make him intoxicated during the relevant time period, *id.* 272.

While Mr. Bartlett was standing at the party, he was approached by petitioner Luis Nieves, a sergeant in the Alaska State Troopers, who was investigating underage drinking. Although it is standard policy for officers to use their digital audio recorders when conducting noncustodial interviews, J.A. 536, and more than 90 to 95 percent of criminal cases in Alaska include such recordings, *id.* 435, Sergeant Nieves did not do so here. *Id.* He offered no "reason why I didn't activate my recorder"—"I just didn't think of activating it." *Id.* 73.

Sergeant Nieves tapped Mr. Bartlett on the shoulder and asked to talk to him. When Mr. Bartlett asked him, "What for?," Pet. App. 8, the sergeant's demeanor "changed," J.A. 363, and his voice took on a "more aggressive tone" that took Mr. Bartlett "aback," *id.* at 364. Mr. Bartlett stated he did not want to speak and asked whether he was "free to go" or was "being detained." *Id.* At that point, the sergeant considered whether to remain on the chance that Mr. Bartlett might "end[] up crossing that line and becoming disorderly" leading to an arrest. *Id.* 188. But instead he turned and walked away.

Some minutes later, Mr. Bartlett observed another trooper, petitioner Brice Weight, questioning a teenager who was staying at respondent's campsite. Believing that Trooper Weight was not authorized to question the teenager without his parent or guardian, Mr. Bartlett approached the trooper. J.A. 370. As he was expressing his concern, Sergeant Nieves returned.

Neither officer activated his recording device. But a portion of the ensuing events was captured on videotape by a local television station, whose reporter

and cameraman had been filming Sergeant Nieves all evening.[2]

The enhanced version of the videotape shows that as the sergeant approached, Trooper Weight looked over, stepped forward, and shoved Mr. Bartlett. Pet. App. 9; J.A. 370.

As Mr. Bartlett fell backwards, his arm went into the air. Sergeant Nieves grabbed the arm and Trooper Weight did a "leg sweep" that brought respondent "down on one knee." Pet. App. 12. Even after he was on his hands and knees, petitioners "tried to force Mr. Bartlett to the ground; he hesitated so as to not aggravate an earlier back injury." *Id.* 9. Petitioners threatened to use a Taser on him. He then lay fully on the snow with his hands behind his back. *Id.* 9-10.

Mr. Bartlett was placed in a trooper vehicle, and Sergeant Nieves informed him that he was "going to jail." Pet. App. 10. He then remarked, "Bet you wish you would have talked to me now." *Id.*

The criminal complaints filed against Mr. Bartlett by the State charged him with disorderly conduct and resisting arrest, both misdemeanors under Alaska law. *See* J.A. 21-26 (alleging violations of Alaska Stat. Ann. §§ 11.61.110(a)(6) and 11.56.700(a)(1)).

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[2] Most of the video was destroyed before respondent learned of its existence. J.A. 82. The remaining video is in the record. The district court observed that "[c]ertain aspects of the video are indeed susceptible to more than one interpretation" given the location from where it was shot, Pet. App. 11. A copy of the video was lodged with the Court as Appendix 1 to respondent's brief at the certiorari stage. An enhanced version of the key interaction was lodged with the Court as Appendix 2 to that brief.

Shortly thereafter, Mr. Bartlett's defense counsel sought discovery of the audiotapes usually available for arrests. Trooper Weight told the district attorney's office that he had not activated his recorder. J.A. 448. Two months later, having received no reply, defense counsel asked whether the prosecution had contact information for anyone who might have taken videotape of the episode. Although Sergeant Nieves told the prosecutor's office he believed the television station had such tape, *id.* 453, the prosecutor failed to disclose this belief and told defense counsel there was no audiotape, *id.* 457.

Some months later, Mr. Bartlett fortuitously found footage of his arrest on YouTube and forwarded the link to his counsel. J.A. 458-59. After the assistant district attorney watched the video clip, he emailed Sergeant Nieves that he "[did]n't like the editing of it. I would like to get the original footage." *Id.* 460. (By then, the remaining videotape had been deleted by the television station.) Earlier, when defense counsel sought to have the charges against him dismissed, the State had responded that it would do so only if Mr. Bartlett would agree not to sue petitioners. *Id.* 245. But two months after viewing the video clip, the State dismissed the case against respondent without obtaining any release.

2. Respondent then filed this damages action against petitioners. As is relevant here, he invoked 42 U.S.C. § 1983, J.A. 35, and alleged that petitioners had violated his "federal" constitutional right to be free from an "unreasonable" seizure and his right to "freedom of speech," *id.* In addition to his First and Fourth Amendment claims, respondent raised several other claims not directly relevant here.

Petitioners moved for summary judgment. They argued that the Fourth Amendment-based false-arrest claim should fail both because there was probable cause for several different offenses, *see* J.A. 101-11, and because qualified immunity would bar respondent's false arrest claim in any event, *id.* 112-17. With respect to the First Amendment retaliation claim, petitioners did not dispute that Mr. Bartlett had a First Amendment right not to talk to Sergeant Nieves. And while they asserted that Mr. Bartlett's comments to Trooper Weight went beyond constitutionally protected criticism, *id.* 112, their central argument was that "even if" the arrest were motivated by Mr. Bartlett's protected speech, his First Amendment claim should fail because they had probable cause for the arrest, *id.* Petitioners did not assert qualified immunity on the First Amendment claim.

Mr. Bartlett opposed the motion. With respect to his Fourth Amendment claim, he argued that petitioners lacked probable cause to arrest him for any of the offenses petitioners claimed justified the arrest. *See* J.A. 277-95.

With respect to his First Amendment claim, Mr. Bartlett argued that petitioners had violated his "constitutional right to freely speak his mind." J.A. 296. He pointed to evidence in the record showing that Sergeant Nieves had been angered by his earlier and lawful refusal to speak, and that the two troopers subsequently "retaliate[ed]" against him "for challenging their authority." *Id.* 257, 296. He pointed out that although the sergeant had claimed in his deposition that he did not make charging decisions based on whether individuals are cooperative or

uncritical, *id.* 382, the videotape showed him earlier that evening declining to ticket a motorist for a moving violation because the individual was "so polite," *id.* 262. Mr. Bartlett argued that this contradiction—in conjunction with the sergeant's assertion that Mr. Bartlett's initial refusal to speak with him was "arguably disorderly conduct," *id.* 144, and the sergeant's statement after the arrest that he "[b]et" Mr. Bartlett "wish[ed] you would have talked to me now," *id.* 376—could justify a jury's finding retaliatory animus.

Mr. Bartlett identified numerous ways in which petitioners' statements in their initial arrest reports contradicted the later-discovered television station videotape. *See* J.A. 260-72. This, he argued, reinforced the conclusion that the arrest was pretextual.[3]

Finally, Mr. Bartlett presented an expert report by a police practices consultant, who had served decades as a Chief of Police, concluding that the arrest "was more probably than not an example of what is known in the police vernacular as "'*contempt of cop*'" or "'*having failed the attitude test.*'" Opp. to Mot. for

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[3] At oral argument before the Ninth Circuit, a member of the court characterized "the affidavit attached to the complaint in this case [as] full of fabrications and facts—alleged facts—that are plainly contradicted by the video that happened to have been taken." Petitioners' counsel responded by admitting that it was "certainly fair to say that the police reports have some inaccuracies and inconsistencies." *See* Oral Argument at 15:14-16:12, Nieves v. Bartlett, 712 F. App'x 613 (9th Cir. 2017) (No. 16-35631), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012294.

Summ. J., Exh. F, at 10, ECF No. 57-7; *see also* J.A. 260 n.13.

3. The district court granted petitioners' motion. With respect to the Fourth Amendment unjustifiable arrest claim, the district court addressed only whether there was probable cause to arrest Mr. Bartlett for harassment. It observed that under Alaska law, a person who "insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response," commits harassment. Pet. App. 20 (quoting Alaska Stat. Ann. § 11.61.120(a)(1)). The court recognized that "viewing all the facts in the light most favorable to" respondent, a jury could find that Mr. Bartlett "did not intend to threaten Trooper Weight and his hand gesture occurred because of [Trooper Weight's earlier] shove." *Id.* 21. But it nonetheless agreed with petitioners that a reasonable officer could have interpreted Mr. Bartlett's actions as a taunt or challenge designed to provoke violence and "could suspect that Mr. Bartlett's conduct was illegal harassment," *id.* 22.

The district court also held that "even if" there was no probable cause, "reasonable officers could disagree about the legality of the arrest." Pet. App. 22. Therefore, petitioners were "entitled to qualified immunity" on the false-arrest claim in any event. *Id.* 22-23.

Having analyzed the Fourth Amendment claim with respect to the offense of harassment, the district court announced that it would not "address whether probable cause also existed to arrest Mr. Bartlett for disorderly conduct, assault, and/or resisting arrest." Pet. App. 22 n.72.

With respect to Mr. Bartlett's First Amendment retaliation claim, the district court did not address the evidence of retaliatory motive. Instead, the district court held that because the troopers had probable cause to arrest Mr. Bartlett for harassment, his claim would fail as a matter of law "even if" his protected speech "motivated the troopers' actions." Pet. App. 37.

4. On appeal, the Ninth Circuit affirmed in part, reversed in part, and remanded the case for further proceedings.

With respect to Mr. Bartlett's Fourth Amendment false-arrest claim, the Ninth Circuit did not hold that probable cause existed for the arrest.[4] Rather, it affirmed the district court's grant of summary judgment solely "on the ground of qualified immunity." Pet. App. 2. It was "at least arguable" that there was "probable cause to arrest Bartlett for harassment." *Id.* 2-3. And although the district court had addressed only whether probable cause existed with respect to the offense of harassment, the court of appeals also stated, without explanation, that petitioners were entitled to qualified immunity because it was also "arguable" that petitioners had probable cause to arrest respondent for disorderly conduct, resisting arrest, or assault. *Id.* 3.

But the court of appeals reversed the district court's grant of summary judgment on the First Amendment retaliation claim. It held that "the district court [had] erred in concluding that Bartlett's retaliatory arrest claim fails simply because the troopers had probable cause to arrest him." Pet. App.

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[4] The Government's statement to the contrary, U.S. Br. 15, is simply incorrect.

5. Under controlling Ninth Circuit precedent, "an individual has a right to be free from retaliatory police action, even if probable cause existed for that action." *Id.* 4-5 (quoting *Ford v. City of Yakima*, 706 F.3d 1188, 1195-96 (9th Cir. 2013)).

The court of appeals then explained why this error was not harmless. "Construing the facts in the light most favorable to Bartlett," the court explained that he had pointed to "sufficient evidence" from which a jury could "'find that the officers' retaliatory motive was a but-for cause of their action.'" Pet. App. 6 (quoting *Ford*, 706 F.3d at 1194). The court of appeals did not review the evidence in detail, but simply identified the allegation that Sergeant Nieves had said "bet you wish you would have talked to me now" after Mr. Bartlett's arrest as one especially "importan[t]" piece of evidence. *Id.*

SUMMARY OF THE ARGUMENT

Petitioners do not dispute that when a police officer arrests an individual because he disapproves of that individual's protected expression, the officer violates the First Amendment. Instead, sweeping aside this Court's decision last Term in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), petitioners argue that 42 U.S.C. § 1983 provides no remedy for this First Amendment violation unless the plaintiff can show that the arrest was without probable cause. Neither Section 1983's text, nor its common-law background, nor precedent, nor experience with the Ninth Circuit rule at issue in this case supports that argument.

This Court's responsibility in Section 1983 cases is to interpret the text Congress provided and not to

make a freewheeling policy choice. In Section 1983, Congress directed that when a "person" acting under color of law, like a police officer, deprives an individual of a right "secured by the Constitution," like the First Amendment's protection against retaliation for protected expression, the officer "shall be liable to the party injured in an action at law." Section 1983's plain language provides no basis for this Court to carve out a subset of First Amendment violations for which no remedy is available. Nor, contrary to the Government's suggestion, does the language permit this Court to impose a "policy" requirement.

The common law background to Section 1983 provides no support for requiring plaintiffs like Mr. Bartlett to prove a lack of probable cause. Even if this Court were to look to the common law of false arrest—and it should not—the Court should affirm the judgment here. While at common law an officer could arrest someone for a misdemeanor that was committed in his presence, the officer could defend against a suit for false imprisonment only by showing that the person he arrested had *actually* committed the misdemeanor for which he was arrested. Probable cause alone was insufficient. And even with respect to arrests for more serious offenses, the common law supports the Ninth Circuit's rule.

Contrary to petitioners' argument, requiring plaintiffs to prove a lack of probable cause will undermine "First Amendment values," Petr. Br. 50, in an area where such protection is especially needed. The arrest power is a readily available and highly effective means of deterring protected expression. This Court has already held that the Equal Protection Clause imposes an independent limitation even on

arrests for which there is probable cause. Accordingly, courts of appeals have uniformly recognized that plaintiffs who bring Section 1983 damages actions alleging a racially discriminatory arrest do not have to show a lack of probable cause. Just as the presence of probable cause for a seizure is not dispositive of a Section 1983 claim against a racially discriminatory arrest, so too probable cause does not determine whether the government is abusing its arrest power to retaliate against protected speech.

Moreover, this Court's decision in *Hartman v. Moore*, 547 U.S. 250 (2006), does not support injecting a no-probable-cause element into Section 1983 damages actions for retaliatory arrests. The Court's decision there flowed from the values that undergird absolute prosecutorial immunity. Safeguarding an absolute immunity plays no role whatsoever in retaliatory-arrest cases.

Nor does any "causal complexity," Petr. Br. 23, justify injecting a no-probable-cause element into Section 1983 retaliatory-arrest cases. First, causation in many such cases, including Mr. Bartlett's, is quite straightforward. Second, the fact that there are *some* cases in which protected speech plays a legitimate role in an arrest decision does not necessitate petitioners' proposed rule.

In truth, petitioners and the Government are not seeking to apply *Hartman*'s rule, which requires plaintiffs only to prove no probable cause for a charged offense. They are actually seeking a far more aggressive rule under which probable cause for *any* offense, even if never charged, defeats a First Amendment claim. There is no justification for this move. And in this case, no court has ever found that

there is probable cause to believe Mr. Bartlett committed either of the offenses for which he was charged. That the Ninth Circuit held that petitioners were entitled to qualified immunity on Mr. Bartlett's Fourth Amendment claim should not entitle them to defeat a First Amendment-based claim, where the clear unconstitutionality of their actions does not hinge on whether there was probable cause.

Experience within the Ninth Circuit shows that the Circuit's rule works well. The Circuit has been using the rule it applied in respondent's case for more than a decade. Yet petitioners have identified precisely *seven* cases to support their claim of unwarranted litigation. A careful review of those cases, plus the cases petitioners' counsel here identified last Term in their *amicus* brief in *Lozman*, undercuts any claim that existing law is insufficient to weed out meritless cases. Existing doctrines governing pleading, summary judgment, and qualified immunity are entirely capable of handling that concern. And changes in technology that provide recordings of police-civilian interactions will provide additional protection in the future to officers who use their arrest power properly.

That being said, the reported cases and episodes described by *amici* reveal occasional but disturbing use of the arrest power against journalists, protesters, and ordinary citizens like Mr. Bartlett who exercise their First Amendment rights. This Court should not adopt a rule that precludes using Section 1983 to remedy this unconstitutional conduct.

ARGUMENT

There is "longstanding recognition that the Government may not retaliate for exercising First Amendment speech rights." *Wilkie v. Robbins*, 551 U.S. 537, 555 (2007). Thus when a police officer arrests an individual whom he would not have arrested but for his disapproval of that individual's protected expression, the officer has violated the First Amendment. Neither petitioners nor the Government dispute this point. Instead, they argue that 42 U.S.C. § 1983 provides no remedy for this First Amendment violation unless the plaintiff can show that the arrest was without probable cause (or, for the Government, pursuant to an official policy of retaliation). Their arguments fly in the face of Section 1983's plain language, the historical backdrop, precedent, and practical reality.

I. Section 1983's text does not support the rules proposed by petitioners and the United States.

It is unintentionally telling that petitioners omit the plain language of Section 1983 from their list of the "sources of authority that guide" this Court's inquiry into whether respondent can maintain his suit. Petr. Br. 13. But this Court's analysis must "begin[], as always, with the statutory text." *United States v. Gonzales*, 520 U.S. 1, 4 (1997). That language, which petitioners never confront, supports the conclusion that police officers who deprive individuals of their First Amendment rights should be amenable to suit.

1. Section 1983's plain text is unequivocal: "*Every* person" who "under color of" law subjects a citizen or a person within the jurisdiction of the United States to

"the deprivation of *any* rights" which are "secured by the Constitution" faces damages liability. 42 U.S.C. § 1983 (emphasis added).

Police officers are undeniably "persons," *see* 1 U.S.C. § 1, who act "under color of" law.

The First Amendment's prohibition on official retaliation is a right "secured by the Constitution." Indeed, "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state," *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987), and is therefore "high in the hierarchy of First Amendment values," *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1955 (2018).[5]

Moreover, Section 1983 creates a damages cause of action for the deprivation of "any" constitutional right. That language provides no basis for requiring that a plaintiff who has shown a violation of one constitutional right—here, the First Amendment—prove an additional element to recover under Section 1983. *See* U.S. Br. 30 (making this argument). Still less does anything in the text of Section 1983 authorize this Court to inject an element—proof that there was no probable cause for the arrest—that amounts to requiring a Section 1983 plaintiff alleging

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[5] Long ago this Court recognized that if "there is any fixed star in our constitutional constellation, it is that no official, high or petty" can compel citizens to speak. *W. Va. State Bd. of Educ. v. Barnette* 319 U.S. 624, 642 (1943). Mr. Bartlett therefore had a First Amendment right to decline to cooperate with the sergeant's investigation and to "go about his business," *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

a First Amendment violation to prove the equivalent of a Fourth Amendment violation as well. *See also infra* pages 27-34 (discussing why compliance with the Fourth Amendment cannot shield an arrest from a First Amendment claim).

Neither petitioners nor the Government provides any support for the idea that this Court has the power to "design the cause of action under 42 U.S.C. 1983," U.S. Br. 7, to circumvent the plain language. To the contrary: this Court's responsibility is to interpret the text Congress provided and "not to make a freewheeling policy choice." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). And in Section 1983, Congress has provided that when persons acting under color of law, like police officers, deprive individuals of their constitutional rights they "shall be liable to the person injured in an action at law," 42 U.S.C. § 1983. This provides a "directive" to courts that "is both mandatory and comprehensive," *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018), to adjudicate those claims.[6]

The Government's proposed rule—under which a plaintiff *can* bring a Section 1983 damages action for a retaliatory arrest even if there is probable cause so long as the arrest is pursuant to official "policy," *see* U.S. Br. i, 1, 6—does additional violence to the plain language of Section 1983. Recall where the "policy" requirement in Section 1983 suits originated. In

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[6] When Congress wants to change Section 1983's remedial rules, it knows how to do so. For example, in 1996, it amended Section 1983 to provide that courts cannot grant injunctive relief against a judicial officer "unless a declaratory decree was violated or declaratory relief was unavailable." Federal Courts Improvement Act of 1996, § 309(c), 110 Stat. 3847.

Monell v. Department of Social Services, 436 U.S. 658 (1978), this Court held that Section 1983's use of the word "person" includes municipal corporations. It then held that these persons, unlike natural persons, can be held liable for damages only if "official municipal policy of some nature caused [the] constitutional tort." *Id.* at 691.

By focusing on policy, the Government in essence proposes a construction of Section 1983 under which *only* municipalities would be liable for a category of First Amendment violations (retaliatory arrests where there is probable cause). But the idea that "the word 'person' may *extend* and be applied to bodies politic," *Monell*, 436 U.S. at 688 (quoting Act of Feb. 25, 1871, § 2, 16 Stat. 431) (emphasis added), hardly supports *withdrawing* Section 1983's application to "natural persons" like petitioners, *id.* at 687.[7]

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[7] And the distinction between single acts and "policy" is nowhere near as clean as the Government and petitioners try to make it. A single act by a government official with final decisionmaking authority in a particular area (a "policymaker") is sufficient to trigger municipal liability. *See Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). In *Lozman*, the plaintiff's claim rested on this theory, rather than on a formal document or a widespread practice. *See Lozman*, 138 S. Ct. at 1951.

There is an even more serious flaw in the Government's argument. Under the Government's theory, a single retaliatory arrest, even if effected or ordered by the chief of police, would be not be actionable under Section 1983, unless the chief was a final municipal policymaker. *See McMillian v. Monroe County*, 520 U.S. 781, 786 (1997) (holding that even when the county sheriff directed the plaintiff's arrest, the county could not be sued because the sheriff was a *state-level* policymaker, not a municipal one). Indeed, even an explicit *policy* of retaliatory arrests ordered

As this Court explained in its foundational decision in *Monroe v. Pape*, 365 U.S. 167 (1961), Congress intended "to enforce provisions of the Fourteenth Amendment [and the incorporated protections of the Bill of Rights] against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Id.* at 171-72. That is personal liability on the part of natural persons.[8]

2. To be sure, this Court has interpreted Section 1983 to exclude certain categories of natural persons from damages liability altogether. But that exclusion rests on the proposition that those persons were entitled to absolute immunity at common law. *Burns v. Reed*, 500 U.S. 478, 497 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part). That explains why officials performing judicial or legislative functions cannot be sued for damages under Section 1983. *See Bogan v. Scott-Harris*, 523 U.S. 44 (1998); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Tenney v. Brandhove*, 341 U.S. 367 (1951).

But "[t]he common law has never granted police officers an absolute and unqualified immunity" of the

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by such an official would be insulated from Section 1983 damages actions. The Government nowhere defends this result.

[8] *Monroe* also provides a response to the Government's proposal for an official-policy element in retaliatory-arrest cases where probable cause exists. *Monroe* held that police officers who are actually acting in violation of official policy are nonetheless acting "under color of" law for purposes of Section 1983. *See Monroe*, 365 U.S. at 183-87. The Government provides no argument for why "under color of law" means one thing for every constitutional right other than the First Amendment, and something different for First Amendment claims.

kind accorded judges or legislators. *Pierson v. Ray*, 386 U.S. 547, 555 (1967). Given that clear historical fact, this Court cannot exempt police officers who are alleged to have made retaliatory arrests from the "[e]very person" language of Section 1983. The Court "do[es] not have a license to establish immunities from § 1983 actions in the interests of what [it] judge[s] to be sound policy. It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate." *Tower v. Glover*, 467 U.S. 914, 922-23 (1984).[9]

II. The common law background relevant to Section 1983 does not support the rules proposed by petitioners and the United States.

Petitioners and the Government also argue that this Court should look to the common-law torts of false arrest, false imprisonment, and malicious prosecution and borrow from them a requirement that a plaintiff bringing a First Amendment retaliatory-arrest claim under Section 1983 plead and prove the absence of probable cause. Petr. Br. 42-48; U.S. Br. 8-14. First, their arguments are conceptually flawed because they ignore the central purpose of the First Amendment. Second, even assuming for the sake of argument that this Court should look to the common law of false

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[9] The "qualified immunity" that police officers can invoke is fundamentally different from the absolute immunity discussed here. Qualified immunity operates with respect to particular claims, and does not insulate police officers from liability when they violate clearly established constitutional prohibitions, as absolute immunity would do. Respondent addresses the relevance of qualified immunity *infra* pages 41-42, 52-54.

arrest, the common law at the time Section 1983 was enacted would not support requiring plaintiffs to prove a lack of probable cause, particularly to challenge a warrantless misdemeanor arrest

1. This Court has repeatedly cautioned against plucking "'prefabricated components'" from common-law torts to "control the definition of § 1983 claims." *Manuel v. City of Joliet*, 137 S. Ct. 911, 921 (2017) (quoting *Hartman v. Moore*, 547 U.S. 250, 258 (2006)). This is especially true for Section 1983 claims involving the First Amendment.

Petitioners acknowledge that "[a]t the time of § 1983's enactment, there was no common-law tort for retaliatory arrest in violation of the freedom of speech." Petr. Br. 43. That is an understatement. The First Amendment actually represents a repudiation of common-law doctrine. At common law, criticism that threatened to undermine respect for the government or public officials constituted the crime of seditious libel. But as this Court explained in *Bridges v. California*, 314 U.S. 252 (1941), "one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press." *Id.* at 264 (citation omitted).

Thus, while common-law doctrines regarding false arrest may provide a useful starting point in understanding Fourth Amendment constraints—because both bodies of law address whether a person's conduct provides grounds for seizing him—they should not apply to First Amendment claims. The relevant First Amendment interest is not directed at arrests; rather, it condemns the use of governmental powers to inflict any form of official reprisal for protected expression. This Court should not limit that remedy

by borrowing an "element," U.S. Br. 30, from tort causes of action not directed at vindicating free speech interests.

2. But even if this Court were to look to the common law, it would not justify reversal. False arrest is a closer analogy than malicious prosecution to a retaliatory-*arrest* claim. But the common law of false arrest/false imprisonment[10] does not support injecting a no-probable-cause element into Section 1983 cases.

The arrest and criminal charges here involve only misdemeanors. *See* J.A. 21-26. Petitioners and the Government ignore completely the common-law rules that governed this category of offenses.

The "ancient common-law rule" was that "a peace officer was permitted to arrest without a warrant for a misdemeanor" that was "committed in his presence." *United States v. Watson*, 423 U.S. 411, 418 (1976). But in a suit for false imprisonment, the officer could defend only by showing that the person he arrested had *actually* committed the misdemeanor for which he was arrested. Probable cause alone was insufficient. *See* Horace L. Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 673, 704 n.561 (1924) (citing cases). So, for example, in *Stearns v. Titus*, 85 N.E. 1077 (N.Y. 1908), the police arrested the plaintiff because they believed he was about to destroy evidence, a misdemeanor under New York law. He brought suit for false imprisonment. On appeal, the New York high court explained that "[t]o justify an arrest without a warrant, for the commission of that offense, the crime

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[10] Respondent agrees with the Government that the terms "false arrest" and "false imprisonment" are "virtually synonymous" with one another. U.S. Br. 9 n.1.

must be actually committed or attempt be made to commit it in the presence of the officer; reasonable suspicion or probable cause to believe its commission is not sufficient" to avoid liability. *Id.* at 1078.

So, too, in *Cook v. Hastings*, 150 Mich. 289 (1907). Hastings, a Detroit police officer, arrested Cook because "he believed and had reason to believe" that Cook was the man who had been exposing himself, a misdemeanor under state law. *Id.* at 290. The Michigan Supreme Court nevertheless held that Cook was entitled to a directed verdict in his favor on his claim of false imprisonment because "[t]here was not only no reasonable ground to believe, but there was not even a suspicion, that plaintiff was a felon or was about to commit a felony. (For the offense of which he was suspected was not a felony.)" *Id.*

And in *Adair v. Williams*, 210 P. 853 (Ariz. 1922), the plaintiffs brought a false-arrest suit after they were arrested for cohabitation in violence of a city ordinance, at most a misdemeanor. The trial court instructed the jury that "a police officer is protected in making an arrest if at the time of the arrest there is probable cause to believe that such person is at the time of said arrest violating any such ordinance." *Id.* at 854. The Arizona Supreme Court disagreed. Evidence of probable cause to arrest for a misdemeanor, the court explained, was "admissible in mitigation of a claim for punitive or exemplary damages. But where plaintiff seeks only compensation for his actual injury the rule is different. In such an action evidence of reasonable and probable cause for defendant's belief in plaintiff's guilt, or other worthy motive, is not admissible in mitigation of the actual damage sustained." *Id.* at 856.

The first Restatement confirms that probable cause was not a defense to a false arrest claim arising out of a misdemeanor arrest. In a comment to the Restatement subsection describing when a warrantless arrest for a non-felony is privileged, it states that "[t]o create the privilege to arrest another, it is not enough that the actor—whether a private person or a peace officer—reasonably suspects that the other is committing a breach of the peace"—the type of non-felony for which warrantless arrests were privileged—unless the actor "is a peace officer and he arrests a participant in an affray"—that is, for public fighting. Restatement (First) of Torts § 119, comment *o* (1934). "If in fact no breach of the peace has been committed, a mistaken belief on the part of the actor, whether induced by a mistake of law or of fact and however reasonable, that a breach of the peace has been committed by the other, does not confer a privilege to arrest" for a non-felony. *Id.*

The common law background thus cannot justify requiring plaintiffs to prove a lack of probable cause in order to prevail on a Section 1983 claim seeking damages for a retaliatory misdemeanor arrest.

3. Even with respect to arrests for more serious offenses, the common law supports the Ninth Circuit's rule.

Twenty years before the enactment of Section 1983, this Court set out its understanding of the common law in *Dinsman v. Wilkes*, 53 U.S. (12 How.) 390 (1852). There, it explained that in a suit "for a malicious prosecution," a plaintiff can prevail only where the prosecution "has been carried on without a probable cause." *Id.* at 402. But it emphasized that "the action for a malicious prosecution is the *only* one

in which the party is not liable, although he acts from malicious motives, and has inflicted unmerited injury upon another." *Id.* (emphasis added). It then contrasted actions for malicious prosecution with actions for "assault [or] false imprisonment." *Id.* As to *these* causes of action, "probable cause or not is of no further importance than as evidence to be weighed by them in connection with all the other evidence in the case, in determining whether the defendant acted from a sense of duty or from ill-will to the plaintiff." *Id.* That evidence of probable cause is probative, but not dispositive, is precisely the position taken by the Ninth Circuit.

Having last Term argued to this Court that *Dinsman* set out this Court's understanding of the common law, *see* U.S. Br. at 25, *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), the Government now switches gears to suggest that *Dinsman* is somehow inapposite because the plaintiff in that case was a sailor suing his commander. U.S. Br. 13. That distinction simply will not wash: the Court expressly stated it was describing the contours of the tort of "false imprisonment." *Dinsman*, 53 U.S. at 402.

Even as to felonies, common-law decisions that mention probable cause as a defense to the tort of false arrest presupposed that the arrest was "*bona fide*"—that is, not "by design or malice and ill will." *Ledwith v. Catchpole*, 2 Cald. 291, 294 (K.B. 1783). Leading legal treatises at the time that Section 1983 was adopted agree: "[A]n action will not lie against a peace officer, for arresting a person *bona fide* on a charge of felony, without warrant, though it turn out that no felony was committed." 1 Francis Hilliard, The Law of Torts or Private Wrongs 222 (1859). "[I]n the case of

actual felony, an officer or a private person may, *without malice* and upon probable cause, arrest a suspected person, without warrant, in order to bring him before a magistrate." *Id.* at 224 (emphasis added). Almost definitionally, an arrest made for the purpose of retaliating against an individual for exercising his First Amendment rights cannot qualify as "without malice" regardless whether there was probable cause.

In short, the Ninth Circuit's rule—that probable cause for an arrest can be evidence with "'high probative force'" of the "lack of retaliatory animus," but is "not dispositive" as a matter of law, *Ford v. City of Yakima*, 706 F.3d 1188, 1194 n.2 (9th Cir. 2013) (quoting *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 901 (9th Cir. 2008))—is entirely faithful to Section 1983's common-law antecedents.[11]

4. The evolution in this Court's qualified immunity decisions reinforces the proposition that traditionally an officer who made an arrest in bad faith could be held liable regardless of the presence of probable cause.

In *Pierson v. Ray*, 386 U.S. 547 (1967), the first decision in this thread, a multiracial group of clergymen sought damages under Section 1983 from

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[11] Even if this Court were to decide for some reason to depart from the common-law understanding with respect to serious crimes, because it thinks the historical evidence more ambiguous with respect to false-imprisonment claims involving warrantless *felony* arrests, *see Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1957 (2018) (Thomas, J., dissenting), or because it thinks retaliation is a far less plausible explanation for arrests involving serious crimes, it should retain the common-law understanding with respect to misdemeanor arrests and affirm the judgment in this case.

police officers who arrested them for breach of the peace when they protested segregation in a bus terminal. The Court held that the officers were entitled to raise "the defense of good faith and probable cause." *Id.* at 557. It explained that "[i]f the jury believed the testimony of the officers" and "found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional." *Id.* Thus, the officers' protection from liability depended on good faith—that is, on whether they were acting for legitimate purposes.

Over the next decade, the Court repeatedly acknowledged that the common law-derived defense was unavailable to defendants who willfully violated a plaintiff's constitutional rights. In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), for example, the Court emphasized that "[w]hen a court evaluates police conduct relating to an arrest" under Section 1983, "its guideline is 'good faith *and* probable cause.'" *Id.* at 245 (emphasis added) (quoting *Pierson*, 386 U.S. at 557). And as the Court explained in *Crawford-El v. Britton*, 523 U.S. 574 (1998), the common law-derived defense the Court engrafted onto Section 1983 claims enabled a plaintiff to prevail "in two different ways, *either* if" (1) the defendant's conduct was objectively unreasonable—the current standard for qualified immunity—"*or* (2) 'he took the action with the malicious intention to cause a deprivation of constitutional rights.'" *Id.* at 587 (emphasis added) (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975)).

It was precisely because common law-derived defenses were unavailable to government officials with improper motives (even if those motives did not

themselves rise to the level of a constitutional violation) that this Court decided in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), to craft the contemporary, wholly objective doctrine of qualified immunity, which asks only whether the constitutional violation was clearly established at the time. There are some First Amendment retaliatory arrest cases for which the contemporary form of qualified immunity is undoubtedly available. *See infra* pages 52-54. But the modern, judicially created doctrine provides no support for the argument that in 1871 the common law would have barred plaintiffs plaintiffs from suing police officers who willfully violated the First Amendment merely because it was possible to identify, perhaps years later, some petty offense for which there was probable cause to make an arrest.

III. Compliance with the Fourth Amendment cannot shield an arrest from First Amendment scrutiny.

An arrest made without probable cause is always a Fourth Amendment violation. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). Petitioners argue that this Court should make a lack of probable cause a necessary "element" of First Amendment-based retaliatory-arrest claims brought under Section 1983 as well. Petr. Br. 17. In effect, they would make proof of a Fourth Amendment violation an indispensable element of a First Amendment claim. This requirement undermines the central protections provided by the First Amendment and is inconsistent with this Court's decisions regarding constitutional rights generally and the First and Fourth Amendments in particular.

1. Petitioners do not contest the proposition that a retaliatory arrest violates the First Amendment. But by insisting that Section 1983 provides a remedy for that First Amendment violation only if the arrest was made without probable cause, they confuse the prohibitions of the First and Fourth Amendments.

To begin, the interests the two amendments protect are not the same. The Fourth Amendment protects one's right to be left alone, while the First Amendment protects one's ability to communicate one's beliefs, not least to government officials.

This Court has never required an individual seeking to prove that one constitutional right has been violated to prove that the government has violated a second constitutional prohibition as well. To the contrary, "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Soldal v. Cook County*, 506 U.S. 56, 70 (1992). When this is the case, the Court "examine[s] each constitutional provision in turn." *Id.* (citing *Hudson v. Palmer*, 468 U.S. 517 (1984); *Ingraham v. Wright*, 430 U.S. 651 (1977)). Thus, in *Soldal*, this Court rejected the court of appeals' refusal to entertain a Fourth Amendment claim because that court thought the due process clause provided a more straightforward way to challenge the seizure of the plaintiff's mobile home. Both claims were actionable.

The plain language of Section 1983 confirms this approach. It entitles plaintiffs to a remedy for the violation of "any rights" secured by the Constitution. And "[i]n this context, as in so many others, 'any' means 'every.'" *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1353 (2018).

2. *Whren v. United States*, 517 U.S. 806 (1996), confirms that probable cause for petitioner's arrest should not bar his First Amendment claim.

In *Whren*, this Court addressed the issue of pretextual traffic stops. It held that as long as such stops are based on "probable cause to believe [a driver] has committed a civil traffic violation," 517 U.S. at 808, they are permissible as a matter of Fourth Amendment law, even if the basis for the stop is different from the officer's motivation for making it. *Id.* at 813. Nonetheless, the Court explained, the *Fourteenth* Amendment imposes an independent prohibition against "selective enforcement of the law based on considerations such as race." *Id.*

Adhering to this guidance, the courts of appeals have uniformly recognized that plaintiffs who bring Section 1983 damages actions alleging a racial discriminatory arrest do not have to show a lack of probable cause. *See, e.g., Holland v. City of Portland*, 102 F.3d 6, 11 (1st Cir. 1996); *Gibson v. Superintendent of N.J. Dep't of Law & Pub. Safety*, 411 F.3d 427, 440-41 (3d Cir. 2005), *overruled on other grounds sub nom. Dique v. N.J. State Police*, 603 F.3d 181 (3d Cir. 2010); *Vakilian v. Shaw*, 335 F.3d 509, 521 (6th Cir. 2003); *Chavez v. Ill. State Police*, 251 F.3d 612, 635 (7th Cir. 2001); *Johnson v. Crooks*, 326 F.3d 995, 999-1000 (8th Cir. 2003); *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1166-67 (10th Cir. 2003).

Petitioners' proposed rule is inconsistent with all this caselaw. Neither petitioners nor the Government offer any explanation of how the Congress that enacted Section 1983 would have had one rule regarding probable cause for racially discriminatory

arrests and another rule regarding probable cause for retaliatory arrests (or, for that matter, arrests based on an individual's religion).

Just as the presence of probable cause for a seizure is not dispositive of a Section 1983 claim against a racially discriminatory arrest, so too probable cause does not determine whether the government is abusing its arrest power to retaliate against protected speech. Dr. Martin Luther King, Jr., was arrested and jailed for driving five miles above the speed limit outside Montgomery, Alabama. *See* Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 Yale L.J. 999, 1028 (1989). Had Dr. King sued for damages under Section 1983, it should not have mattered whether he had alleged that he was arrested because he was African American or due to his advocacy of racial equality. Either way, he would have had a cause of action.

3. Not even all *Fourth* Amendment Section 1983 lawsuits require plaintiffs to prove a lack of probable cause. Excessive use of force that violates the Fourth Amendment can support a Section 1983 damages suit "notwithstanding the existence of probable cause to arrest." *Graham v. Connor*, 490 U.S. 386, 394 (1989); *see Tennessee v. Garner*, 471 U.S. 1, 7-9 (1985).

Petitioners ignore this reality. They point to *Mam v. City of Fullerton*, 2014 WL 12573550 (C.D. Cal. 2014), and *Holland v. City of San Francisco*, 2013 WL 968295 (N.D. Cal. 2013), as examples of the problem with the Ninth Circuit's rule that probable cause for an arrest is not a categorical defense to a retaliatory arrest claim. Petr. Br. 37, 38. But in both those cases, the plaintiffs not only had a First Amendment

retaliatory-arrest claim, but they also had an excessive force claim that would have gone to trial under any rule. *Mam*, 2014 WL 12573550, at *1; *Holland*, 2013 WL 968295, at *4-5. In the face of this reality, petitioners can state no principled or pragmatic reason for extinguishing claims under the First Amendment.

4. Contrary to petitioners' argument, Petr. Br. 48-51, injecting a no-probable cause element into Section 1983 retaliatory arrest cases will undermine "First Amendment values," *id.* at 50. Their cavalier assertion that "arrest decisions made by individual offers are not so potent a means of suppressing speech," *id.* at 51, blinks reality.

Two features of arrests, whatever the rank of the officer who physically restrains an individual, make them an especially serious threat to First Amendment freedoms. First, the arrest power provides an opportunity for the government to retaliate against virtually every member of the public. Second, the consequences of arrests may be especially chilling.

More than seventy-five years ago, Justice Jackson warned that "[w]ith the law books filled with a great assortment of crimes," there is a "fair chance of finding at least a technical violation of some act on the part of almost anyone." When the government "pick[s] the man and then search[es] the law books," government abuse of power becomes most dangerous. "It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group." Robert H. Jackson, The Federal Prosecutor 4-5 (1940), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf.

Given the breadth of offenses in modern criminal codes, virtually every citizen has violated some law—or, more precisely, there is probable cause (or even more loosely, "arguable" probable cause, Pet. App. 3) to believe he has done so. And once there is probable cause to believe a person has committed "even a very minor criminal offense" for which the only punishment is a fine, this Court permits custodial arrest. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001); *see also id.* at 355-60 (listing statutes that permit warrantless misdemeanor arrests).

Such minor crimes are legion. Individuals interact with police officers on a daily basis. Disturbing the peace and disorderly conduct offenses are notoriously plastic and can, as in Mr. Bartlett's case, give rise to arrest for "contempt of cop." *See supra* page 7. *See also* Brief of the Roderick and Solange Macarthur Justice Center as Amicus Curiae in Support of Respondent. And "very few drivers can traverse any appreciable distance without violating some traffic regulation"; thus, "virtually everyone who ventures out onto the public streets and highways" may be subject to arrest as well. 3 Wayne R. LaFave, Search and Seizure § 5.2(e), at 156 (5th ed. 2012) (internal quotation marks and citation omitted). Even members of this Court have admitted to speeding. *See* Tr. of Oral Arg. 9, *Reichle v. Howards*, 566 U.S. 658 (2012) (No. 11-262) ("I might sometimes have driven 60 miles an hour in a 55-mile zone"); Tr. of Oral Arg. 27, *Maslenjak v. United States*, 137 S. Ct. 1918 (2017) (No. 16-309) ("I drove 60 miles an hour in a 55-mile-an-hour zone.").

Moreover, petitioners' blithe assertion that there is "little danger" that officers will "carry out a premeditated plan to target speech" they do not like,

Petr. Br. 51, is unfounded. In small jurisdictions, or jurisdictions where an officer regularly patrols in a particular neighborhood, police may have repeated interactions with residents whose views they finds objectionable. *See, e.g.*, *Beck v. City of Upland*, 527 F.3d 853, 856-57 (9th Cir. 2008). In a similar vein, as several *amici* in support of respondent point out, police often are aware of the journalists who cover police activity during demonstrations, and may have a motive to sideline those reporters.

The short- and long-term consequences of being arrested make arrest an especially powerful deterrent. "[A] person of ordinary firmness would be chilled from future exercise of his First Amendment rights if he were booked and taken to jail in retaliation for his speech." *Ford v. City of Yakima*, 706 F.3d 1188, 1194 (9th Cir. 2013) (per curiam); Pet. App. 6 (citing *Lacey v. Maricopa County*, 693 F.3d 896, 917 (9th Cir. 2012)).

Once a person is arrested, he may end up spending two days in jail before any neutral magistrate reviews the arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991). Even individuals "suspected of committing minor offenses" can be repeatedly strip searched. *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 330 (2012).

Arrests also have long term consequences even if an individual is never prosecuted. Arrests become a matter of public record. A host of outside actors routinely review and use arrest records in making decisions about how to treat individuals. Among them are "immigration enforcement officials, public housing authorities, public benefits administrators, employers, licensing authorities, social services providers, and education officials." Eisha Jain, *Arrests as Regulation*,

67 Stan. L. Rev. 809, 810 (2015). A prior arrest—even one that took place long ago and resulted in no charges—can permanently affect a person's livelihood. Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, Wall St. J. (Aug. 18, 2014), http://on.wsj.com/2lV1viR.

The deterrent effects of an arrest also extend far beyond the individual who was arrested. Mr. Bartlett's arrest, for example, was filmed, broadcast on local television, and made available on the internet. *See supra* pages 4-5. Viewers who saw that arrest may be chilled from making their own First Amendment-protected challenges to police practices.

IV. This Court's decision in *Hartman v. Moore* does not support injecting a no-probable-cause element into Section 1983 damages actions for retaliatory arrests.

Petitioners and the United States misconstrue *Hartman v. Moore*, 547 U.S. 250 (2006). Contrary to their arguments, the differences between suits alleging retaliatory prosecutions and ones alleging retaliatory arrests outweigh the similarities. As this Court recognized in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), "there are substantial arguments that *Hartman*'s framework," which governs malicious prosecution cases, "is inapt in retaliatory arrest cases." *Id.* at 1953.[12]

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[12] It is worth remembering that *Hartman* was a *Bivens* case. Given that *Bivens* actions are a creation of this Court (rather than Congress), *see Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854 (2017),

1. The Court's decision in *Hartman* flowed from the values that undergird absolute prosecutorial immunity. Prosecutors themselves, of course, are absolutely immune from Section 1983 damages liability even if they decide to maintain a prosecution for entirely unconstitutional reasons. But even a Section 1983 retaliatory-prosecution suit against a "nonprosecutor" can undermine prosecutorial immunity, because winning will require the plaintiff to show how the vengeful nonprosecutor "influenced" the formally immune prosecutor's decision to proceed, *See Hartman*, 547 U.S. at 262. Even these suits will involve precisely the inquiry into prosecutorial decisionmaking that absolute prosecutorial immunity is designed to forestall: the parties in the Section 1983 suit are almost sure to seek information from "the prosecutor's mind," *id.* at 263, and his files to prove (or rebut) causation.

This Court was willing to permit Section 1983 suits to proceed if plaintiffs can plead and prove the absence of probable cause because then the claim can be litigated without intruding on prosecutorial decisionmaking. The lack of probable cause provides a "prima facie inference that the unconstitutionally

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this Court is free to craft their elements based on its view of wise policy. (Indeed, in *Reichle v. Howards*, 566 U.S. 658 (2012), this Court observed that it had not yet decided whether "*Bivens* extends to First Amendment retaliatory arrest claims" at all. *Id.* at 663 n.4.) But this Court is not similarly free to "design the cause of action under 42 U.S.C. 1983," see U.S. Br. 7. There, "[t]he role of this Court is to apply the statute as it is written—even if [it] think[s] some other approach might accor[d] with good policy." *Burrage v. United States*, 571 U.S. 204, 218 (2014) (internal quotation marks omitted).

motivated inducement infected the prosecutor's decision to bring the charge." *Hartman*, 547 U.S. at 265. This solves the "distinct problem of causation" that might otherwise exist. *Id.* at 263. The Court's citation to *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), and *United States v. Armstrong*, 517 U.S. 456 (1996)—which both involved prosecutorial decisionmaking—to identify that problem shows that absolute prosecutorial immunity is the explanation for why the Court struck the balance it did. *See id.* at 263.

2. Safeguarding an absolute immunity plays no role whatsoever in retaliatory-arrest cases. Police officers lack absolute immunity; they possess only qualified immunity. *See Scheuer v. Rhodes*, 416 U.S. 232, 245-48 (1974). The independent decisionmaking of prosecutors is a far cry from the "competitive enterprise of ferreting out crime" and arresting suspects. *Giordenello v. United States*, 357 U.S. 480, 486 (1958) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). Arrest decisions (unlike prosecutorial ones) are opened up to judicial scrutiny every day. And the "'presumption of regularity accorded to prosecutorial decisionmaking'" simply "does not apply." *Reichle v. Howards*, 566 U.S. 658, 669 (2012) (quoting *Hartman*, 547 U.S. at 263).

Nor does any "causal complexity," Petr. Br. 23, justify injecting a no-probable-cause element into Section 1983 cases involving retaliatory-arrest claims. This is so for several reasons.

First, causation in retaliatory-arrest cases is not inherently complex. Many cases, like this one, are quite straightforward. In suits where the plaintiff alleges that the arresting officer harbored the

retaliatory animus, there is "no [causal] gap to bridge" at all. *Reichle v. Howards*, 566 U.S. 658, 671 (2012) (Ginsburg, J., concurring in the judgment). The factfinder simply must determine whether the officer intended to punish the plaintiff for the plaintiff's protected speech.

Petitioners stress that respondent has advanced "distinct theories of retaliatory animus" against each of them. Petr. Br. 22. But that creates no complexity with regard to *causation*; it simply demands that the jury assess each petitioner's alleged motive individually. Only if respondent proves to the jury that each of them was motivated by a desire to retaliate can he recover against them both. If he shows such a motive with respect to only one of them, then only that petitioner will be liable. Nothing very complex about that.

Second, the fact that there are *some* cases in which speech "plays a legitimate role in an officer's decision whether to arrest someone," Petr. Br. 23, does not necessitate petitioners' proposed rule. In both *Lozman* and this case some of the protected speech was temporally removed from the arrest and thus provides no basis for the arrest. *See Lozman*, 138 S. Ct. at 1954; Petr. Br. 22; *see also infra* page 48 (pointing to other cases where the protected speech preceded the encounter that led to the arrest).

This is equally so in several of the cases on which petitioners try to rely. For example, in *Morse v. San Francisco Bay Area Rapid Transit District*, 2014 WL 572352 (N.D. Cal. 2014), *see* Petr. Br. 37, the protected speech involved articles published by the plaintiff, a journalist, beginning in 2009, roughly *two years* before the arrest at issue. 2014 WL 572352, at *1. Similarly,

in *Eberhard v. California Highway Patrol*, 2015 WL 6871750 (N.D. Cal. 2015), *see* Petr. Br.38-39, the plaintiff had interacted with patrol officers and supervisors for many months before the arrest. 2015 WL 6871750, at *2.

Even when speech shortly precedes an officer's decision to arrest, other doctrines respond sufficiently to the concern that officers will shirk from effectuating legitimate arrests where speech is in the mix. A plaintiff must show that his arrest-inducing speech was constitutionally protected or he has no First Amendment claim regardless whether there was probable cause for his arrest. Speech that itself proposes or constitutes a crime is unprotected. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Examples of this category include true threats, extortion, and fraud. So, too, for speech that confesses to a crime. A person who "state[s] to FBI agents that he ha[s] burned his [draft] registration certificate because of his beliefs" can be prosecuted for destroying the certificate. *United States v. O'Brien*, 391 U.S. 367, 369, 382 (1968). And speech that flouts valid time, place, or manner restrictions can be restricted consistent with the First Amendment.

To be sure, evidence regarding probable cause can be *relevant* to a retaliatory-arrest claim. When there is probable cause to believe the plaintiff committed a serious crime, his assertion that he was arrested because of some protected expression will likely fail because his arrest is entirely "consistent," *Bell Atlantic Corp. v. Twombly*, 550 U.S 544, 557 (2007), with legitimate law enforcement activity. *See also infra* pages 47, 50-51 (discussing how pleading rules can weed out meritless retaliatory-arrest claims).

On the other hand, even when there *is* probable cause, there are offenses for which police so rarely make arrests that the presence of probable cause will have little probative weight in the face of evidence of a retaliatory motive. For example, in two of the cases cited by petitioner, Petr. Br. 37, individuals engaged in protected speech were arrested (but never prosecuted) while individuals who were simultaneously engaged in the same behavior but who had not engaged in protected speech were not. *See, e.g.*, *Morse*, 2014 WL 572352, at *9-10; *Mam v. City of Fullerton*, 2013 WL 951401, at *5 (C.D. Cal. 2013). These catch-and-release arrests are especially troubling under the First Amendment. And when they involve sidelining journalists, such arrests deprive the public as a whole of valuable information, as the *amicus* briefs filed in support of respondent by news organizations explain.

3. Moreover, the Court's assumption in *Hartman* that proving the absence of probable cause would be "cost free" to both the plaintiff and the court, 547 U.S., at 265, does not carry over to the retaliatory-arrest context either.

In retaliatory prosecution cases, the putative plaintiff will have an indictment or charging instrument that cabins the probable cause inquiry by identifying a specific crime. The plaintiff need only plead and prepare to prove a lack of probable cause for the crimes actually charged. For example, Hartman was charged with offenses involving mail and wire fraud and stolen postal property. He was not required also to show that there would have been no probable cause to prosecute him for, say, RICO or violations of the federal bribery or false-statement statutes.

But when it comes to *arrests* and Fourth Amendment claims, courts are not restricted to assessing probable cause with respect to offenses formally charged. Under *Devenpeck* v. *Alford*, 543 U.S. 146 (2004), an arrest satisfies the Fourth Amendment so long as the "known facts provide probable cause" for *any* offense, not just the one in the officer's mind or in an initial charging document, *id.* at 153. Therefore, if petitioners and the Government were candid, they would acknowledge that they are not seeking to apply *Hartman*'s no-probable-cause-for-the-charged-offense rule to retaliatory-arrest claims. They are actually seeking a far more aggressive rule.

There is no justification for this move. *Devenpeck* rests on a construction of substantive Fourth Amendment law: if there is probable cause to arrest for any crime, there is no Fourth Amendment violation for Section 1983 to remedy. By contrast, a retaliatory arrest violates the First Amendment regardless whether there was probable cause for the arrest; the only question is the remedial one.

So if this Court were to engraft a no-probable cause requirement, it would be doing so as a matter of Section 1983 law, not constitutional law. There is no reason any such requirement must track Fourth Amendment doctrine.

As respondent has already explained, probable cause for the charged offense can provide a common-sense basis for believing the officer made the arrest in good faith. The Ninth Circuit's rule, which recognizes that probable cause can be "probative" of the lack of animus, *see supra* page 25—fully respects that intuition. But when counsel for the officer in a Section 1983 case tries to defeat a colorable First Amendment

claim by substituting a claim of probable cause for a never-charged offense, that assumption is untenable. The true motivation for an arrest cannot be an offense unthought of by the arresting officer at the time he acted.[13]

4. In any event, the Court should affirm the judgment here. The criminal complaints filed against Mr. Bartlett charged him with disorderly conduct and resisting or interfering with arrest in violation of Alaska Stat. Ann. §§ 11.61.110(a)(6) and 11.56.700(a). J.A. 21, 25. No court has ever found that there is probable cause to believe he committed either of these offenses.

The circumstances of Mr. Bartlett's case introduce yet a further wrinkle that militates in favor of affirmance. Contrary to the assumption underlying the Government's argument, U.S. Br. 15, and blurred by petitioners, *see* Petr. Br. 12, the Ninth Circuit never held that there was probable cause with respect to *any* offense. Rather, because the court of appeals affirmed the district court's grant of summary judgment to petitioners on Mr. Bartlett's Fourth Amendment false arrest claim solely "on the ground of qualified immunity," Pet. App. 2, at most there is nothing more

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[13] The Government floats a proposal that if the Court decides not to mechanically apply *Devenpeck*, "it should require a retaliatory-arrest plaintiff to show the absence of probable cause for those offenses charged before the plaintiff's criminal trial or asserted at the pleading stage of the civil litigation." U.S. Br. 15. The latter suggestion ignores the fact that an offense first identified by a creative lawyer in response to a Section 1983 suit may have no bearing on whether the officer had a retaliatory motive. In any event, petitioners here did not identify any offense in their answer.

than a finding of "arguable probable cause," *id.* at 3, something another step further removed from actual criminal culpability.

As this Court explained in *Anderson v. Creighton*, 483 U.S. 635 (1987), "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present." *Id.* at 641. These officers are entitled under those circumstances to qualified immunity on a Fourth Amendment-based claim because it is not clear that they violated the Constitution. But that hardly entitles them to summary judgment on a First Amendment-based claim, where the *constitutionality* of their actions does not hinge on whether there was probable cause. *All* retaliatory arrests are unconstitutional and petitioners have not argued otherwise.

V. Experience within the Ninth Circuit shows that the Circuit's rule works well.

Petitioners and their *amici* contend that without a requirement that Section 1983 plaintiffs plead and prove a lack of probable cause, the courts will be flooded with meritless retaliatory-arrest claims. But as this Court trenchantly observed in *Hartman v. Moore*, 547 U.S. 250 (2006), with respect to a similar prediction about malicious-prosecution claims, there is no "leverage" to that fear when "the slate is not blank." *Id.* at 258. The Ninth Circuit has been using the rule it applied in respondent's case for more than a decade. *See Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006); *see also* Pet. App. 4 (citing *Ford v. City of Yakima*, 706 F.3d 1188, 1195-96 (9th Cir. 2013)). And

its experience shows that the rule is both eminently fair and entirely workable.

1. Petitioners have identified precisely *seven* cases to support their claim of an unwarranted deluge of litigation within the Ninth Circuit.

Petitioners cite three cases for the proposition that "almost any time" protected speech occurs "'contemporaneously to[] criminal activity,'" citizens will be able to tie up police officers in litigation because a "possible inference of retaliation will exist." Petr. Br. 26 (quoting *Lozman*, 138 S. Ct. at 1953-54). Those cases prove no such thing. In *White v. County of San Bernadino*, 503 Fed. App'x 551 (9th Cir. 2013), the district court in fact granted summary judgment to the defendants on the plaintiff's First Amendment retaliation claim, even though it permitted other claims to go to trial, and the court of appeals affirmed. *See id.* at 553, 554. In *Dell'Orto v. Stark*, 123 F. App'x 761 (9th Cir. 2005), the district court erroneously denied defendants' motion for summary judgment on the plaintiff's *Fourth* Amendment claim, *id.* at 762. The court of appeals opinion makes clear that any reasonable officer would have arrested the plaintiff, who was drunk and about to place his key in the ignition of his car. *Id.* So under the Ninth Circuit's but-for test, had the district court properly decided the Fourth Amendment question, the plaintiff's First Amendment claim would have been knocked out on summary judgment at the latest. As for *Maidhof v. Celaya*, 641 Fed. App'x 734 (9th Cir. 2016), the court of appeals held that the plaintiffs had failed to present "'specific, nonconclusory' evidence" of a retaliatory motive, *id.* at 735 (quoting *Jeffers v. Gomez*, 267 F.3d 895, 903, 907 (9th Cir. 2001)); thus the defendant—a

police chief who "directed" the arrests, *id.* at 734-35, and not a line-level officer—was entitled to judgment as a matter of law. None of these cases suggests the need for a more stringent rule.

As for the four cases petitioners cite that went to trial on a retaliatory arrest claim, *see* Petr. Br. 37-39, they do not justify petitioners' position either.

Two cases involved arrests of journalists after their extensive criticism of the government, rather than speech made in close proximity to the arrest.

In *Morse v. San Francisco Bay Area Rapid Transit*, 2014 WL 572352 (N.D. Cal. 2014), officers were told ahead of time to watch for the plaintiff at upcoming demonstrations and to arrest him if they could. *Id.* at *9. Of the approximately two dozen journalists covering the protest, Morse was the only one arrested. *Id.* at *5, *7. The arresting officer did "not arrest other journalists whose conduct may have been virtually indistinguishable from Plaintiff's." *Id.* at *15. Furthermore, Morse "was subject to a custodial arrest, rather than the cite-and-release procedure used for other arrestees at the protest." *Id.* at *11.

In *Eberhard v. California Highway Patrol*, 2015 WL 6871750 (N.D. Cal. 2015), the plaintiff, a photojournalist, was arrested for trespassing at a protest. No charges were filed against him, and he was not prosecuted. *Id.* at *2. When Eberhard "protested to [the arresting officer] that he was just trying to do his job as a journalist," the officer "smiled" and responded that "'he had heard about [the] prior incidents'" where Eberhard tangled months earlier with an officer who tried to prevent him from covering a highway project. *Id.* at *7.

The final two cases on which petitioners rely would have gone to trial even under petitioners' preferred rule, because both plaintiffs had excessive use of force claims. In *Mam v. City of Fullerton*, 2013 WL 951401 (C.D. Cal. 2013), after finding the plaintiff's excessive force claim could proceed to trial, the court explained that the absence of a police report, the brutality of the arrest, the officer's effort to prevent Mam from recording police behavior, and the fact that many other people were standing near Mam, but only Mam—the sole person recording the incident—was arrested, made it a jury question whether the arrest was retaliation for recording an event of public interest. *Id.* at *5.

In *Holland v. City of San Francisco*, 2013 WL 968295 (N.D. Cal. 2013), the plaintiff was arrested after her outspoken challenge to the police officers' decision to arrest another protestor. As she watched the protester being taken away, she raised her hands to her head and her elbow struck an officer's shoulder. *Id.* at *1. She claimed that officers then surrounded her, "grabbed her arms from behind, kicked her in the shins, kicked her off her feet, threw her face first onto the ground, and put a knee on her head and neck." *Id.* The next day, after being strip searched and held overnight, she was released and the charge that she had disobeyed the instructions of an officer directing traffic was dismissed. *Id.* at *2. Although the district court found probable cause for the arrest, *id.* at *3, it denied summary judgment on Holland's excessive force claim, based on a video of the arrest, *id.* at *4-5. And it allowed her First Amendment claim to proceed because it found that "[a] reasonable juror could infer from this testimony that Holland would not have been

arrested or subjected to excessive force had it not been for her persistent questioning of the officers and verbal challenges to their authority." *Id.* at * 5.

Presumably, petitioners cherry picked these cases from among the cases within the Ninth Circuit because they are the strongest examples of the problems they assert. If so, their proposed rule is a solution without a problem.

2. Last Term, the State of Alaska (whose attorneys represent petitioners here), identified 27 cases in the Ninth Circuit after *Skoog* where plaintiffs pressed First Amendment retaliatory-arrest claims. *See* Br. for the State of Alaska as Amicus Curiae in Support of Respondent at 17-18, *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018). Respondent has reviewed each of those cases. Setting aside the present case and two cases where the arrests antedated *Skoog*,[14] two dozen cases remain. Taken as a group, these cases provide no support for the claim that the Ninth Circuit's rule results in unjustifiable litigation.

In five of the cases, the Ninth Circuit concluded that there was no probable cause for the underlying arrest.[15] In two others, the plaintiff had an excessive

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[14] *See Ra El v. Crain*, 399 F. App'x 180, 182 (9th Cir. 2010); *Scallion v. City of Hawthorne*, 280 F. App'x 671, 673 (9th Cir. 2008).

[15] *See Beck v. City of Upland*, 527 F.3d 853, 857 (9th Cir. 2008); *Dirks v. Grasso*, 449 F. App'x 589, 591 (9th Cir. 2011); *Lacey v. Maricopa County*, 693 F.3d 896, 916-17 (9th Cir. 2012) (en banc); *Sharp v. Orange County*, 871 F.3d 901, 910 (9th Cir. 2017) (but finding qualified immunity because the absence of

use of force claim as well as a retaliatory-arrest claim.[16] In four others, the Ninth Circuit held that there was a genuine factual dispute over whether there was probable cause for the underlying arrest.[17] So these eleven cases—nearly half the cases in the set Alaska provided—would still have gone forward even under petitioners' proposed rule.

In eight other cases, the district court either dismissed the case on the pleadings or granted summary judgment, and the Ninth Circuit affirmed, usually on the grounds that the plaintiff had not provided sufficient nonconclusory evidence from which a reasonable jury could find that a retaliatory motive was the but-for cause of the plaintiff's arrest.[18] Here, petitioners' proposed rule is unnecessary.

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probable cause was not clearly established); *Tarr v. Maricopa County*, 256 F. App'x 71, 73 (9th Cir. 2007).

[16] *See Jackson v. City of Pittsburg*, 518 F. App'x 518, 520-21 (9th Cir. 2013) (Section 1983 plaintiff prevailed on retaliation claim after trial); *Nichols v. City of Portland*, 622 F. App'x 679, 679 (9th Cir. 2015) (Section 1983 plaintiff lost on both excessive force and retaliation claims after trial).

[17] *See Adkins v. Limtiaco*, 537 F. App'x 721, 722 (9th Cir. 2013); *Reed v. Lieurance*, 863 F.3d 1196, 1206 (9th Cir. 2017) (involving issuance of misdemeanor citation without arrest); *Vohra v. City of Placentia*, 683 F. App'x 564, 566 (9th Cir. 2017); *Wilson v. City of San Diego*, 462 F. App'x 683, 685 (9th Cir. 2011).

[18] See *Blomquist v. Town of Marana*, 501 F. App'x 657, 659 (9th Cir. 2012); *Glair v. City of Los Angeles*, 437 F. App'x 581, 582 (9th Cir. 2011); *Gutierrez v. County of Los Angeles*, 545 F. App'x 701, 701 (9th Cir. 2013); *Ikei v. City & County of Honolulu*, 441 F. App'x 493, 495 (9th Cir. 2011); *Kubanyi v. Covey*, 391 F. App'x 620, 620–21 (9th Cir. 2010); *Tahraoui v. Brown*, 539 F. App'x 734,

But what the cases do reveal is that petitioners and the Government are simply wrong in how they characterize the typical retaliatory-arrest claim. In four cases (and Mr. Bartlett's as well), the Ninth Circuit pointed to direct evidence of the arresting officer's retaliatory motive.[19] In several of those cases, as well as three others, the protected speech occurred significantly before the challenged arrest.[20] And as the captions of the cases reflect, many of the defendants

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734 (9th Cir. 2013); *White*, 503 F. App'x at 553; *Willes v. Linn County*, 650 F. App'x 444, 444 (9th Cir. 2016).

[19] *See Beck*, 527 F.3d at 868 (after months of escalating disputes over contracting practices by the city, police chief told the plaintiff "we should have taken care of you a long time ago"); *Ford*, 706 F.3d at 1190–91 (after telling the plaintiff that he had "discretion" whether to book or release the plaintiff for violating a city noise ordinance by playing his car radio too loudly, the officer arrested the plaintiff and said, "*You talked yourself—your mouth and your attitude talked you into jail. Yes, it did.*"); *Sharp*, 871 F.3d at 908 (when plaintiff who was mistakenly handcuffed and detained when police thought he, rather than his son, was the person named in an arrest warrant, swore at the deputies and threatened to sue them, the deputy who arrested him replied, "If you weren't being so argumentative, I'd probably just put you on the curb"); *Vohra*, 683 F. App'x at 567 (when plaintiff who had written several letters to the chief of police criticizing police practices asked why he had been arrested, arresting officer allegedly replied, "So you can write another letter to the chief of police").

[20] *See Lacey*, 693 F.3d at 916 (plaintiff's newspaper had been publishing articles critical of Sheriff Joe Arpaio for years before trumped-up arrest); *Reed*, 863 F.3d at 1201, 1203 (the plaintiff's non-profit conservation organization filed a lawsuit challenging the park's treatment of buffaloes several weeks before the plaintiff was arrested); *Martin v. Naval Criminal Investigative Serv.*, 539 F. App'x 830, 831 (9th Cir. 2013).

were municipalities or higher-level officials, not line-level officers.

To be sure, there were three cases (out of 24) where there was probable cause for the underlying arrest and a district court permitted the plaintiff nonetheless to proceed on a retaliatory-arrest claim only for the Ninth Circuit to hold that there was insufficient evidence of a retaliatory motive to support a First Amendment claim.[21] But that result shows that the Ninth Circuit is being careful to protect police against marginal claims, not that this Court should throw out the Ninth Circuit's rule.[22]

3. It is hardly surprising that petitioners could find little real-world evidence to vindicate their fears.

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[21] *See Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 901–02 (9th Cir. 2008); *Maidhof*, 641 F. App'x at 736-37; *Picray v. Duffitt*, 652 F. App'x 497, 499 (9th Cir. 2016).

[22] The Government's criticism of the Ninth Circuit's approach in *Dietrich*, see U.S. Br. 28, is misplaced. In that case, the Ninth Circuit found that the plaintiff had failed to produce any evidence that the officer who arrested her was even aware of her protected speech. *See Dietrich*, 548 F.3d at 901. In then writing that a combination of very weak evidence of motive combined with strong evidence of probable cause was insufficient to let her case proceed, the Ninth Circuit was not manipulating summary judgment law. Rather, it was concluding only that "no reasonable juror could find from the undisputed facts that Defendants acted in retaliation for Plaintiff's First Amendment activities." *Id.*

The plausibility of a plaintiff's theory can of course be taken into account at the summary judgment stage. It is a "settled principle[] that if the factual context renders [a plaintiff's] claim implausible," then the plaintiff "must come forward with more persuasive evidence to support [his] claim than would otherwise be necessary." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Existing doctrines governing pleading, summary judgment, and qualified immunity are entirely capable of weeding out meritless cases while permitting plaintiffs with legitimate retaliation claims to vindicate their First Amendment rights.

Pleading rules do a sound job of throwing out meritless claims at the motion to dismiss stage. A plaintiff's complaint will be dismissed unless it pleads facts "plausibly suggesting" that the defendant's retaliatory animus was a cause of the arrest. *See Bell Atlantic Corp. v. Twombly*, 550 U.S 544, 557 (2007). If a plaintiff pleads nothing more than facts "merely consistent" with retaliation, the complaint will not survive. *See id.* In *Twombly* itself, the telephone companies' alleged behavior was equally consistent with activity prohibited and permitted by the Sherman Act. The Court therefore held that the facts alleged in the complaint were not enough to state a claim. *Id.* at 553-57; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678-80 (2009). Thus, allegations that are equally consistent with both forbidden retaliation and legitimate law enforcement activity do not state a claim.

The framework for retaliation claims articulated by this Court in *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1974), requires proof of retaliatory "animus" toward protected speech, *Hartman*, 547 U.S. at 260, not simply consideration of such speech. Thus, it is not enough for a plaintiff to allege merely that he was engaged in protected speech at the time of his arrest. Cases will quickly get knocked out absent plausible allegations that government officials directly expressed animus or sufficiently detailed allegations regarding a course of

dealing between the plaintiff and the government that provides strong circumstantial evidence of hostility to the substance of the plaintiff's First Amendment activity.

Particularly in cases involving arrests for serious felonies, courts are likely to grant judgment to defendants once they determine that there was probable cause for the arrest because they will conclude that no reasonable jury would reject the defendant's same-decision defense.

Petitioners are thus mistaken in claiming that a plaintiff in the Ninth Circuit could have succeeded on a stylized version of *Kilpatrick v. United States*, 432 Fed. App'x 937 (11th Cir. 2001). Petr. Br. 24. The van at issue in that case displayed a sign saying "Remember the Children of Waco!" *id.* at 939, and parked by the Federal Building on the anniversary of the Waco incident, which was also the anniversary of the Oklahoma City bombing. The "van was reminiscent of the one used in the Oklahoma City bombing, it had tinted windows, and it was of a size capable of containing explosives." *Id.* Furthermore, "[o]fficers had received a tip linking the driver of the anti-ATF van to an incident involving the gun dealer who had previously supplied David Koresh, leader of the Branch Davidians, with weapons." *Id.*

Even if the plaintiff in such a case could plausibly allege animus against the message displayed on the van and somehow get her suit past the motion to dismiss stage—and that hypothesis is itself questionable—defendants would almost certainly receive summary judgment on their "same decision defense." Any officer, regardless of his or her views "toward the content of unpopular speech challenging

authority," Petr. Br. 24, would have made a stop under similar circumstances. Courts taking a common-sense approach to summary judgment are entirely capable of ensuring that cases like *Kilpatrick* are resolved early.

And technological developments mean that in the future, summary judgment may be even easier for defendants to obtain in weak cases. As petitioners' supervisor acknowledged, J.A. 435, 536, it is now standard practice for troopers to audiotape their encounters with civilians. The Government too points to "the increasing use of video cameras by police departments." U.S. Br. 31. When the entire encounter leading to an arrest is recorded, it will be easy for courts to grant summary judgment when the recording undercuts the plaintiff's claim of retaliatory animus. *Cf. Scott v. Harris*, 550 U.S. 372 (2007). By contrast, in this case, the videotape evidence strengthens Mr. Bartlett's claim. *See supra* pages 4, 7.

Finally, this Court's qualified immunity doctrine provides sufficient protection to officers called upon to make time-pressured decisions. Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). There is no need for additional immunities that are unsupported by the text of Section 1983. A sensible application of qualified immunity to cases claiming retaliatory arrests shields officers from damages if the court finds that under the circumstances, a reasonable officer would have made the arrest irrespective of the speech, or that the speech itself made the arrest reasonable, or that it was unclear that the speech was protected.

Lozman, which held that a plaintiff does not need to plead and prove absence of probable cause, "[o]n facts like these," 138 S. Ct. at 1955, represents a case-by-case approach to situations in which government retaliation for protected speech takes the form of the arrest. Qualified immunity therefore will protect law enforcement officials in all situations in which there is no binding precedent clearly establishing that it violates the First Amendment to take particular speech into account.

Fogel v. Collins, 531 F.3d 824 (9th Cir. 2008), provides a clear example of this point and squarely rebuts petitioners' reliance on *Kilpatrick*. The plaintiff in *Fogel* challenged his arrest because it was based in part on his van's bearing the words "A FUCKING SUICIDE BOMBER COMMUNIST TERRORIST!" with "W.O.M.D. ON BOARD." *Id.* at 827. While the court determined that this speech was not a true threat—and thus was protected by the First Amendment—the court nonetheless concluded that the officers were entitled to qualified immunity because under the circumstances it was unclear whether "all reasonable officers would have concluded that Fogel's speech was protected." *Id.* at 834.

This Court's robust qualified immunity strikes a more justifiable balance than petitioners' proposed rule. The consequence of petitioners' rule would be to immunize officers from Section 1983 liability even if they expressly declare on camera that they dislike an individual's protected expression and they intend to arrest him to make him pay for exercising his rights. Arrests for minor violations in which law enforcement officials openly proclaim that they are targeting people who support certain candidates for office, hold

particular religious beliefs, or object to government policies have an enormous chilling effect on the population at large. There should be no immunity in such cases.

VI. Alternative possibilities for addressing retaliatory arrests cannot justify limiting Section 1983.

Petitioners, the Government, and various *amici* claim that Section 1983 damages suits for retaliatory arrests are unnecessary because there are other mechanisms to "deter" officers, such as "internal investigation and discipline." Petr. Br. 52-53; ; *see also* U.S. Br. 30-32; Br. of D.C. et al. 18-23 ("D.C. Br,"); Br. of Nat'l Ass'n of Counties et al. 20-21 ("NAC Br."). The amount of space they devote to this issue implicitly concedes the need to deter arrests that violate the First Amendment, even if those arrests do not violate the Fourth Amendment as well. But none of the alternatives they identify comes anywhere close to a meaningful substitute for Section 1983 suits.

1. The possibility of criminal prosecution for officers who "engage in retaliatory arrests notwithstanding the existence of probable cause," U.S. Br. 30, fails to provide a meaningful alternative to Section 1983 damages actions. For one thing, it provides no direct remedy to the individual who suffered violation of his constitutional rights. And it is telling that the United States points to not a single case in which the Department of Justice has brought a prosecution against any police officer for a retaliatory arrest. This is not because the Department is unaware that police officers retaliate against protected expression. *See* U.S. Dep't of Justice, Civil

Rights Div., *Investigation of the Baltimore City Police Department* 116-21 (Aug. 10, 2016), https://tinyurl.com/kzm8las ("In sum, [the Baltimore Police Department] takes law enforcement action in retaliation for individuals' engaging in protected speech or activity in violation of the First Amendment.").

2. All the citations, by the United States and other *amici*, to potential responses to unconstitutional arrests provided by state law or municipal policy are entirely beside the point. *See* Petr. Br. 53, U.S. Br. 31 n.5; D.C. Br. 18-23; NAC Br. 17-18.

This Court could not have been clearer in its landmark decision in *Monroe v. Pape*, 365 U.S. 167 (1961), which "rejected the view" that Section 1983 "does not reach abuses of state authority that are forbidden by the State's statutes or Constitution or are torts under the State's common law." *Zinermon v. Burch*, 494 U.S. 113, 124 (1990). It is simply "no answer" to a Section 1983 damages claim "that the State has a law which if enforced would give relief." *Monroe*, 365 U.S. at 183.

Still less can state laws that *do not* provide relief defeat a Section 1983 damages claim. Although the National Association of Counties lists all fifty states' parallels to the First Amendment, NAC Br. at 17-18 n.7, it offers no evidence that state law has provided effective remedies to individuals subjected to retaliatory arrests. The impetus for Section 1983's enactment in the first place was the failure of state law to provide full protection of constitutional rights. If the presence of practical considerations, potential criminal liability, and state-law correctives do not immunize other constitutional challenges to arrests or

other First Amendment claims from scrutiny under Section 1983—and they do not—then they should not preclude suits like Mr. Bartlett's either.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Jeffrey L. Fisher
Pamela S. Karlan
Leah M. Litman
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Kerri L. Barsh
GREENBERG TRAURIG
333 S.E. Second Avenue
Miami, FL 33131

Zane D. Wilson
Counsel of Record
Tyler P. Broker
CSG, INC.
714 Fourth Avenue
Suite 200
Fairbanks, AK 99701
(907) 452-1855
zane@alaskalaw.com

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No. 17-1174

In the Supreme Court of the United States

LUIS A. NIEVES AND BRYCE L. WEIGHT,
Petitioners,

v.

RUSSELL P. BARTLETT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

JAHNA LINDEMUTH
Attorney General of Alaska

DARIO BORGHESAN
Counsel of Record
ANNA R. JAY
STEPHANIE GALBRAITH MOORE
1031 W. Fourth Ave.
Suite 200
Anchorage, AK 99501
(907) 269-5100
dario.borghesan@alaska.gov

Counsel for Petitioners

November 1, 2018

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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REPLY BRIEF FOR PETITIONERS

"A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Pierson v. Ray*, 386 U.S. 547, 555 (1967). Yet that is the choice police officers face in the Ninth Circuit, which holds that a plaintiff may pursue a retaliatory arrest claim under 42 U.S.C. § 1983 even if the officer had probable cause to arrest the plaintiff. Because retaliatory motive is "easy to allege and hard to disprove," *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998), this rule discourages officers from making legitimate arrests when suspects are exercising First Amendment rights—whether through political protest or personal insult. The Court should not create a "systematic disincentive to arrest where . . . arresting would serve an important societal interest." *Atwater v. City of Lago Vista*, 532 U.S. 318, 321 (2001). Instead the Court should hold—consistent with the common law and the Court's closest precedent, *Hartman v. Moore*, 547 U.S. 250 (2006)—that the lack of probable cause for an arrest is an essential element of a First Amendment retaliatory arrest claim under § 1983.[1]

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[1] Respondent wrongly asserts (Br. 1, 16-17) that the Petitioners and the Government advocate different legal rules for retaliatory arrest claims. Petitioners argue that a § 1983 claim of retaliatory arrest is barred if there was probable cause for the arrest, unless it falls within the "unique class" of claims alleging an official policy of retaliation described in *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1954 (2018). Petitioners understand the Government to be arguing for the same rule. While the precise contours of *Lozman*'s rule have not yet been drawn, that question is not presented in this case: Respondent has not alleged the existence of an official policy of retaliation.

Respondent fails to show why the common law and *Hartman* should not compel this rule. In holding that the existence of probable cause bars the closely related claim of retaliatory prosecution, *Hartman* established that common-law concepts are an appropriate guide for First Amendment-based claims. The common law has traditionally shielded police officers from liability when it authorizes them to make an arrest based on probable cause, regardless of alleged motive. And the facts of this case show why *Hartman*'s logic applies to retaliatory arrest claims: determining causation is often difficult due to a "police officer's wholly legitimate consideration of speech," *Reichle v. Howards*, 566 U.S. 658, 668 (2012), giving the existence or absence of probable cause "high probative force" on the merits of the claim, *Hartman*, 547 U.S. at 265.

Outcomes in the Ninth Circuit confirm that probable cause is a strong proxy for merit. Although retaliatory arrest cases go to trial even if there is probable cause for the arrest, Respondent has not shown that any of these cases resulted in a verdict in the plaintiff's favor. Instead, juries in these cases rejected the claims of retaliatory arrest. A no-probable-cause element will permit recovery for the arrests most likely caused by retaliatory animus while screening out claims with little merit.

I. The text of § 1983 permits a no-probable-cause element for retaliatory arrest claims.

In authorizing an "action at law" to remedy the deprivation of federal rights, "§ 1983 creates a species of tort liability." *Heck v. Humphrey*, 512 U.S. 477, 483 (1994). Accordingly the Court is "guided in interpreting Congress' intent [in enacting § 1983] by the common-

law tradition." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). Ignoring this maxim, Respondent advances an interpretation of § 1983 that would undercut the basis for absolute and qualified immunity and create different standards for retaliatory prosecution claims against state and federal officials.

1. Respondent supports his textual argument with cases having nothing to do with § 1983 (Br. at 14-18), while ignoring the decisions interpreting it. "Although [§ 1983] on its face admits of no immunities, [the Court] read[s] it 'in harmony with general principles of tort immunities and defenses rather than in derogation of them.' " *Malley*, 475 U.S. at 339 (1986) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)). Defenses and immunities " 'well grounded in history and reason' [were] not abrogated 'by covert inclusion in the general language' of § 1983." *Imbler*, 424 U.S. at 418 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)).

Accordingly the Court has recognized absolute immunity from § 1983 claims for legislators, *Tenney*, 341 U.S. at 379, judges, *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967), and prosecutors, *Imbler*, 424 U.S. at 431, as well as qualified immunity for executive branch officials, *Wood v. Strickland*, 420 U.S. 308, 318 (1975) (invoking "common law tradition" of immunity).

Respondent has no logical basis for arguing (Br. 14-19) that the text of § 1983 permits these defenses and immunities but not a probable cause defense for police officers. The fact that police officers were never entitled to absolute immunity does not mean that Congress intended to abrogate the similarly well-grounded defense that officers *did* enjoy at common law.

Cf. Pierson, 386 U.S. at 557 (recognizing defense of good faith and probable cause for police officers arresting under law later ruled unconstitutional).

2. Accepting Respondent's textual argument would also mean creating different standards for retaliatory prosecution claims against federal and state officers. In attempting to distinguish *Hartman* (Br. 34 n.12), Respondent notes that the claim arose under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), implying that *Hartman*'s rule does not—and cannot—apply to claims under § 1983. But *Hartman* did not suggest any distinction between retaliatory prosecution claims under *Bivens* and § 1983. *See Hartman*, 547 U.S. at 255 ("The Courts of Appeals have divided on the issue of requiring evidence of a lack of probable cause in 42 U.S.C. § 1983 and *Bivens* retaliatory-prosecution suits."); *id.* at 259 (observing that "a *Bivens* (or § 1983) plaintiff must show a causal connection" between retaliatory animus and injury to assert First Amendment retaliation claim); *id.* at 259 & n.6 (listing retaliatory prosecution claims under "*Bivens* or § 1983"). Adopting Respondent's argument would require the Court to hold that a retaliatory prosecution claim has different elements depending on whether it is brought against state officers under § 1983 or federal officers under *Bivens*.

II. The common law supports a no-probable-cause element for retaliatory arrest claims.

The "appropriate starting point" for determining the elements of a retaliatory arrest claim under § 1983 is the common law cause of action that provides the "closest analogy." *Heck*, 512 U.S. at 483, 484. Respondent's own claim most closely resembles a claim

for malicious prosecution, which requires the plaintiff to show a lack of probable cause. But even if the proper analogy were a claim for false imprisonment, the lack of probable cause would still bar recovery.

1. Respondent first argues (Br. 19-20) that the Court should ignore the common law entirely because the First Amendment did not exist at common law, but the common law analogy is fair. A claim for malicious prosecution and a § 1983 claim for retaliatory arrest in violation of the First Amendment address a similar problem: enforcing the criminal law due to an evil motive. *See Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 925 (2017) (Alito, J., dissenting) ("[S]ubjective bad faith, *i.e.*, malice, is the core element of a malicious prosecution claim . . . ."). Not just the evil motives of private persons, but those of public officials too, *e.g. Atkinson v. Birmingham*, 116 A. 205 (R.I. 1922); *Bobsin v. Kingsbury*, 138 Mass. 538 (1884).

And *Hartman* confirms that common-law principles apply to First Amendment-based constitutional torts. There the Court ruled that the lack of probable cause is an essential element of a retaliatory prosecution claim. 547 U.S. at 265-66. If a no-probable-cause element—a concept ultimately rooted in the common law—is compatible with a retaliatory prosecution claim, it is compatible with a retaliatory arrest claim too.

2. The tort of malicious prosecution is the closest analogy to Respondent's claim. False imprisonment deals primarily with unlawful detention, while malicious prosecution involves the initiation of a criminal proceeding. *Compare* Restatement (First) of Torts §§ 35, 118 (1934) (Restatement) *with*

Restatement § 653. Trooper Weight validly arrested Respondent and then filed a criminal complaint, J.A. 20-30, which initiated a criminal proceeding. Restatement § 654 & cmt. a.

Accordingly, Respondent would have to show the absence of probable cause to pursue his claim at common law. The absence of probable cause "is as much an element in the action for a malicious criminal prosecution as the evil motive which prompted the prosecut[ion]," *Wheeler v. Nesbitt*, 65 U.S. 544, 550 (1860), and Respondent does not argue otherwise.

3. Even if false imprisonment were the closer analogy, the existence of probable cause for the arrest would still be a complete defense to liability. Respondent's narrow focus on distinctions between the types of arrests officers could make at common law (Br. 21-23) overlooks the more salient point that, both then and now, the law has always shielded police officers from liability for false imprisonment when it privileges them to make an arrest based on probable cause.

At common law, a defendant would not be liable for a claim of false imprisonment if the law privileged him in making the arrest. Restatement §§ 10, 118. The privilege to make a warrantless arrest was limited; in general, a private person could do so only if the person he arrested had actually committed a felony, attempted a felony in his presence, or was engaged in a breach of the peace. *See* Restatement § 119. The law typically gave peace officers somewhat broader privilege to arrest without a warrant, largely based on probable cause. *See* Restatement § 121 (privileging arrest by peace officer if he "reasonably suspects" that felony has been committed or that person arrested participated in

"an affray"). The greater privilege was afforded "because the peace officer has a duty to the public to prevent crime and arrest criminals," a duty that "would be seriously impaired" if officers were not "protected from liability for the consequences of honest and reasonable mistakes." Restatement § 121 cmt. g.

Respondent correctly points out that the types of arrests privileged at common law in the nineteenth century are different than the types of arrests privileged today. And he cites cases where officers were held liable for an unprivileged arrest: *e.g.*, when the crime was not one for which officers could arrest without a warrant in any circumstance, *Cook v. Hastings*, 114 N.W. 71, 72 (Mich. 1907); when officers could not arrest unless the crime was committed in their presence, *Adair v. Williams*, 210 P. 853, 853-54 (Ariz. 1922); or when the state's statute did not privilege warrantless arrest for a misdemeanor upon probable cause, *Stearns v. Titus*, 85 N.E. 1077, 1078 (N.Y. 1908). But his argument—that the Court should (at most) recognize a no-probable-cause element to retaliatory arrest claims only if the existence of probable cause would have privileged an arrest for that particular offense at common law in 1871 (Br. 21-23)—does not follow.

There is little reason to think that Congress intended the scope of the privilege to arrest to be frozen in time for purposes of § 1983 liability. The Court interprets § 1983 "in harmony with general principles of tort immunities and defenses." *Malley*, 475 U.S. at 339. And the general principle that the privilege to arrest would protect an officer from liability for the arrest was so "well-grounded in history and reason"

that Congress likely did not intend to "abrogate[]" it "by covert inclusion in the general language of § 1983." *Imbler*, 424 U.S. at 418. But specific rules governing the exact scope of authority to arrest were varied, subject to debate, and evolving.[2] *Atwater v. City of Lago Vista*, 532 U.S. 318, 331-45 (2001).

Today, officers have far greater authority to make warrantless arrests than they did in 1871. *Atwater*, 532 U.S. at 344 ("[T]oday statutes in all 50 States and the District of Columbia permit warrantless misdemeanor arrests by at least some (if not all) peace officers without requiring any breach of the peace . . . ."). And a warrantless misdemeanor arrest is privileged if supported by probable cause both as a federal constitutional matter, *see Virginia v. Moore*, 553 U.S. 164, 171 (2008) ("[W]hen an officer has probable cause to believe a person committed even a minor crime in his presence . . . [t]he arrest is constitutionally reasonable."), and generally as a matter of state law, *e.g.*, *Yeatts v. Minton*, 177 S.E.2d 646, 648 (Va. 1970); *Miller v. State*, 462 P.2d 421, 425-26 (Alaska 1969); *Coverstone v. Davies*, 239 P.2d 876, 878-79 (Cal. 1952). Holding that probable cause defeats a claim of retaliatory arrest is thus consistent with the common-law principle that an officer is not liable for an arrest that the law privileges him to make.

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[2] Indeed, Respondent's assertion that the existence of probable cause did not privilege a misdemeanor arrest is not entirely correct. The exact privilege depended on the jurisdiction's statutory or common law. For example, in some places the arrest of "nightwalkers" for disorderly conduct was privileged if probable cause was shown. *See Miles v. Weston*, 60 Ill. 361, 365 (1871).

Following Respondent's logic would mean that the rules for retaliatory arrest claims under § 1983 would turn on the "minor and often arbitrary" distinctions between misdemeanors and felonies. *Tennessee v. Garner*, 471 U.S. 1, 14 (1985). Although Respondent argues that this distinction is logical because retaliation is a less plausible explanation for arrests involving felonies than misdemeanors (Br. 25 n.11), that is not always true: today "numerous misdemeanors involve conduct more dangerous than many felonies." *Garner*, 471 U.S. at 14. This approach would also mean that liability for retaliatory arrest claims would turn on distinctions in how states extend the authority to arrest. *Compare, e.g.*, Cal. Penal Code § 836.5(a) (West) ("A public officer or employee, when authorized by ordinance, may arrest a person without a warrant whenever the officer or employee has reasonable cause to believe that the person to be arrested has committed a misdemeanor in the presence of the officer or employee that is a violation of a statute or ordinance that the officer or employee has the duty to enforce."), *with* Wis. Stat. Ann. § 968.07(1)(d) (West) ("A law enforcement officer may arrest a person when: . . . [t]here are reasonable grounds to believe that the person is committing or has committed a crime."). The Court has rejected the kind of "vague and unpredictable" standard that results from tying the protections of federal law to diverse state law rules. *Moore*, 553 U.S. at 175.

4. An officer's motive is irrelevant to the tort of false imprisonment, and an allegation of bad motive does not negate the privilege to arrest. So if a peace officer "ma[de] the arrest for the purpose of bringing the other before a court," then "the fact that [the

officer] has an ulterior motive in making it, does not make the arrest unprivileged." Restatement § 127 & cmt. a; *accord Wiegand v. Meade*, 158 A. 825, 826 (N.J. 1932) ("The essential thing in an action for false imprisonment is the constraint of the person without legal justification. The good or evil intention of the defendant does not excuse or create the tort.").

Respondent argues (Br. 24-25) that a peace officer could not defeat a charge of arrest without showing that the arrest was "*bona fide*," which Respondent takes to mean lacking evil motive. But Respondent misconstrues the term. While courts spoke of peace officers being protected when their "conduct is marked by good faith," that good faith (*bona fide*) was determined objectively: "where the arrest was shown to have been made upon information reasonably sufficient to warrant the belief that crime has been committed." *Neal v. Joyner*, 89 N.C. 287, 290 (1883). Thus it was stated that a peace officer would not be liable for "arresting a person *bona fide* on a charge of felony . . . though it turn out that no felony was committed," with the arrest being *bona fide* if the officer had "reasonable grounds to suspect" the person of a felony and detained him "for the purpose of securing him to answer a complaint."[3] 1 Francis Hilliard, The Law of Torts or Private Wrongs 222 (1859). So too in *Ledwith v. Catchpole*, 2 Cald. 291, 294-95 (K.B. 1783), where Lord Mansfield contrasted a *bona fide* arrest—one "done fairly and in pursuit of an offender"—with an arrest "by design or malice and ill will," and went on to

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[3] As the Restatement explains, the purpose of an arrest is determined objectively, and does not entail an inquiry into motive. Restatement § 127 cmt. a; *see also* Pet. Br. 46 n.7.

indicate that an arrest supported by probable cause would be *bona fide*. *See id.* at 295 ("[I]t would be a terrible thing, if under probable cause an arrest could not be made . . . .").

Respondent has not pointed to a single decision by a common law court holding that although a peace officer's arrest was privileged, the defendant might be liable because of his allegedly bad motive. *Dinsman v. Wilkes*, 53 U.S. 390 (1851), does not fit the bill. In that case the plaintiff was an enlisted man who sued his commanding officer "for punishment inflicted upon him for refusing to do duty, in a foreign port." *Id.* at 402. The Court characterized the action as one for "assault and false imprisonment" and ruled that the defendant could be liable if he acted out of improper motives. *Id.* Yet not only did the ruling reflect the unique relationship between captain and sailor, rather than peace officer and suspect, but the plaintiff was challenging the condition of his confinement, not the authority for his detention. *See id.* at 404 (recounting allegation that captain "inflicted punishment beyond that which, in his sober judgment, he would have thought necessary" by "confin[ing] him on shore" in a foreign prison "rather than on shipboard"). The case sheds no light on the prevailing common law rules that applied to peace officers making arrests for felonies and misdemeanors.

5. The Court's early qualified immunity cases do not suggest that an allegation of bad faith could subject an officer to liability for arrest despite the existence of probable cause. In *Pierson v. Ray*, 386 U.S. 547 (1967), for example, the question of the defendant officers' good faith arose because the statute they invoked to arrest

the plaintiffs was later ruled unconstitutional. *Id.* at 557. In relying on a common law principle that police officers who "reasonably believed in good faith that the arrest was constitutional" are protected from liability despite having no lawful basis to arrest, *id.*, the Court did not suggest that the common law would inquire into officers' motives when they *did* have a lawful basis to arrest.

III. *Hartman v. Moore* supports a no-probable-cause element for retaliatory arrest claims.

1. *Hartman*'s logic—that the complexity of retaliatory prosecution claims calls for a no-probable-cause element—applies with similar force to retaliatory arrest claims. Twice this Court has recognized that retaliatory arrest claims entail a more complex causal inquiry than ordinary claims of retaliation because officers may often legitimately take suspects' speech into account in deciding whether to arrest them. *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1953 (2018); *Reichle v. Howards*, 566 U.S. 658, 668 (2012). This reality compounds the already-difficult task of disproving subjective motive and makes police officers particularly vulnerable to meritless retaliatory arrest claims.

Respondent's attempt to show otherwise by focusing on this case only underscores the point. Respondent asserts (Br. 37) that "some of [Respondent's] protected speech was temporally removed from the arrest and thus provides no basis for the arrest." That is both incorrect—Sgt. Nieves could validly have considered Respondent's earlier expression of hostility in assessing his state of mind as he approached Trooper Weight, Pet. Br. 23—and a tacit concession that the rest of

Respondent's speech could have legitimately informed the officers' reactions.

There is little force in Respondent's argument (Br. 38) that limitations on the First Amendment itself temper the complexity of retaliatory arrest claims. To be sure, speech is subject to reasonable time, place, and manner restrictions. But much of the speech that officers might consider in deciding whether to arrest—aggressive speech that is not a true threat or speech suggesting the suspect's motive—falls well within the protection of the First Amendment.

Because determining causation is difficult, the presence or absence of probable cause has "high probative force" in determining whether an arrest was caused by retaliatory motive. *Hartman*, 547 U.S. 265. The two cases Respondent cites in arguing otherwise (Br. 39) prove the point. In both cases, there was probable cause for the arrest, but the district court denied summary judgment—and in both cases juries found the arrest was not retaliatory. *Morse v. San Francisco Bay Area Rapid Trans. Dist.*, No. 12-cv-05289 JSC, ECF 119 (N.D. Cal. Sep. 29, 2014); *Mam v. City of Fullerton*, No. 8:11-cv-01242-JST, 2014 WL 12573550, at * 3 (C.D. Cal. July 24, 2014). It is telling that Respondent does not cite any retaliatory arrest case in which the arrest was supported by probable cause and a jury found that the arrest was retaliatory.

2. The fact that police officers lack the absolute immunity that prosecutors enjoy does not lessen *Hartman*'s application here. To be sure, the prosecutor's immunity, and the consequent need to show that the non-immune defendant's retaliatory motive induced the prosecutor to act, is a reason *why*

the causal connection in retaliatory prosecution claims is complex. *Hartman*, 547 U.S. at 263. But causation in retaliatory arrest claims is particularly complex too, if for a different reason. Evidence of probable cause has "powerful evidentiary significance" for both claims. *Hartman*, 547 U.S. at 261.

The Court's decision was not an automatic extension of prosecutorial immunity either, as Respondent suggests. Rather, it reflected the Court's conclusion that using an effective albeit imperfect screen for meritorious claims is preferable to incurring the costs of litigating marginal ones.[4] *Id.* at 263-65. Subjecting officers to liability for making reasonable arrests has costs, too. So given the "high probative force" of probable cause on the difficult question of causation, it "makes sense" to require the plaintiff to show its absence in order to maintain a claim of retaliatory arrest. *Id.* at 265-66.

3. Respondent argues (Br. 39-41) that even if *Hartman*'s logic applies to retaliatory arrest claims, it applies only if there is probable cause for the offense *charged*. But his explanation—that "[t]he true motivation for an arrest cannot be an offense unthought of by the arresting officer at the time he acted"—undercuts this arbitrarily narrow rule. For

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[4] Respondent is incorrect in stating (Br. 35) that the Court in *Hartman* required the plaintiff to show the absence of probable cause because only then could the claim "be litigated without intruding on prosecutorial decisionmaking." Rather, even if the plaintiff showed the lack of probable cause for the prosecution, he would still have to probe the prosecutor's thought process to prove causation. *See Hartman*, 547 U.S. at 265 ("[S]howing an absence of probable case may not be conclusive that the inducement succeeded . . . .").

example, Sgt. Nieves told Respondent that he was being arrested for "harassing my trooper," Resp. App. Disk 1 at 2:25—the very offense that the district court found probable cause to arrest for.[5] Respondent cannot reasonably maintain that the offense Sgt. Nieves *told Respondent he was being arrested for* could not plausibly have been Sgt. Nieves's true motivation for the arrest, just because Respondent was ultimately charged with the different but closely related offense of disorderly conduct. *Compare* Alaska Stat. § 11.61.110(a)(5)-(6) (person commits crime of disorderly conduct if person "challenges another to a fight" or "recklessly creates a hazardous condition for others by an act which has no legal justification or excuse") *with* Alaska Stat. § 11.61.120(a) (person commits crime of harassment in second degree if he "insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response").

4. Using an "objective fact requirement" like probable cause, *Hartman*, 547 U.S. at 258, for retaliatory arrest claims is consistent with the Court's rejection of purely subjective standards in the criminal law context. In protesting that compliance with the Fourth Amendment does not preclude the finding of a

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[5] Respondent is wrong in asserting (Br. 9, 41-42) that the court of appeals never affirmed the existence of probable cause to arrest for any offense. The court of appeals said that the test for probable cause is whether "the information the officer had at the time of making the arrest" gave rise to probable cause, and then said, "We agree with the district court that it did." Pet. App. 3. In any event, the district court unambiguously concluded that Respondent's arrest was justified by probable cause, Pet. App. 21-22, and the court of appeals did not disturb that finding, Pet. App. 4-5.

First Amendment violation (Br. 27-28), Respondent misses the point. The objective standards of the Fourth, Fifth, and Sixth Amendments reflect the accumulated wisdom of the Framers, this Court, and the common law tradition that "evenhanded law enforcement is best achieved by the application of objective standards of conduct," *Kentucky v. King*, 563 U.S. 452, 464 (2011), that the motives of officers acting in fast-moving, "kaleidoscopic situation[s]" are "instinctive" and "largely unverifiable," *New York v. Quarles*, 467 U.S. 649, 656 (1984), and that it would be unwise "to throw down the bars which protect public officers from suits for acts done within the scope of their duty and authority, by recognizing the right of every one . . . to make use of an allegation that they were malicious in motive." *Chesley v. King*, 74 Me. 164, 175-76 (1882). The same considerations apply in determining the elements for a claim under § 1983.

Requiring a no-probable-cause element for retaliatory arrest claims is not fatally inconsistent with rules for selective enforcement claims under the Fourteenth Amendment, as Respondent suggests (Br. 29-30). There are good reasons why a no-probable-cause element does not apply to the latter. The standard for selective enforcement has its own "demanding" objective component, requiring the plaintiff to show both a discriminatory purpose and a discriminatory effect. *See United States v. Armstrong*, 517 U.S. 456, 463, 465 (1996). And while there is virtually no legitimate reason to consider a suspect's race when making an arrest, there is often a reason to consider the suspect's speech, complicating the officer's ability to defend himself from claims of retaliatory

motive. The differences in the nature of these claims justify different standards.

5. Experience in the Ninth Circuit confirms that it "makes sense" to apply *Hartman*'s no-probable-cause element to retaliatory arrest claims. *Hartman*, 547 U.S. at 265-66. That element is a strong proxy for merit. And without it, the difficulty of defending against retaliatory arrest suits under the Ninth Circuit's rule threatens to chill police officers from making otherwise legitimate arrests for fear of having to deal with a lawsuit like this one. The other mechanisms Respondent suggests for containing those costs do not do the trick.

Although Respondent does not acknowledge the costs of retaliatory arrest litigation, the Ninth Circuit does. That is why in *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892 (9th Cir. 2008), the court of appeals crafted a special rule of summary judgment for retaliatory arrest claims that weighs evidence of probable cause against evidence of motive. *Id.* at 901. Without this rule, the court recognized that "nearly every retaliatory First Amendment claim would survive summary judgment." *Id.* Respondent's attempt to recast the *Dietrich* rule as the faithful application of the principle that implausible claims cannot survive summary judgment (Br. 49 n.22) is unpersuasive. The Ninth Circuit's rule assesses probability, not plausibility, which is why the court's attempts to apply that rule result in split decisions—a fact that Respondent omits to mention. *See Maidhof v. Celaya*, 641 F. App'x 734, 737-38 (9th Cir. 2016) (Rawlinson, J., dissenting); *White v. Cty. of San Bernardino*, 503 F. App'x 551, 555 (9th Cir. 2013) (Graber, J.,

dissenting). The subjectivity of that standard offers little reassurance that reasonable arrests will avoid trial. And if this Court ruled in Respondent's favor, there would be no guarantee that the other circuits would feel similarly free to modify their rules of summary judgment.

Pleading standards and "regular" summary judgment do not address the problem. A plaintiff need only allege that the arresting officer made a questionable statement some time before, during, or after the arrest in order to survive dismissal under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Of the eleven cases Respondent cites to argue that pleading rules and summary judgment filter out weak claims, only one (*Glair v. City of Los Angeles*, 437 F. App'x 581, 582 (9th Cir. 2011)) was dismissed for weak allegations or evidence of retaliatory intent under ordinary pleading or summary judgment standards:

- one case was decided in the defendants' favor because the plaintiffs had not engaged in protected speech, *Blomquist v. Town of Marana*, 501 F. App'x 657, 659 (9th Cir. 2012);
- one was decided for the defendants because the plaintiff did not preserve his First Amendment retaliation claim for appeal, *Kubanyi v. Covey*, 391 F. App'x 620 (9th Cir. 2010);
- two were decided for defendants because the plaintiffs had not offered *any* admissible evidence of retaliatory intent or had not alleged action "that would deter a person of ordinary firmness from filing complaints against police officers," *Gutierrez v. City of Carson*, No. LA

CV10-07627 JAK, 2011 WL 7129239, at *6, *11 (C.D. Cal. Dec. 16, 2011), *aff'd sub nom. Gutierrez v. Cty. of Los Angeles*, 545 F. App'x 701 (9th Cir. 2013); *Tahraoui v. Brown*, No. C11-5901BHS, 2012 WL 472898, at *2 (W.D. Wash. Feb. 13, 2012), *aff'd*, 539 F. App'x 734 (9th Cir. 2013);

- one held that the defendants were entitled to qualified immunity because "[t]he purported right to be free from a retaliatory arrest that is otherwise supported by probable cause was not clearly established in this circuit at the time of [the plaintiff's] arrest," *Picray v. Duffitt*, 652 F. App'x 497, 498 (9th Cir. 2016);

- two were dismissed based on the court's determination that probable cause defeated a claim of retaliatory arrest, *Willes v. Linn Cty.*, 650 F. App'x 444 (9th Cir. 2016), *cert. denied sub nom. Willes v. Linn Cty., Or.*, 137 S. Ct. 482 (2016); *Ikei v. City & Cty. of Honolulu*, 441 F. App'x 493, 495 (9th Cir. 2011);

- and three resulted in summary judgment in favor of defendants under *Dietrich's* altered summary judgment standard, *Maidhof*, 641 F. App'x at 735; *White*, 503 F. App'x at 553; *Dietrich*, 548 F.3d at 901.

Even under the *Dietrich* rule, meritless retaliatory arrest claims proceed to trial. *See* Pet. Br. 37-39. Respondent insists that two of these cases would have gone to trial anyway on excessive force claims (Br. 45), but he ignores the difference between proving that one's actions were reasonable under the circumstances

and the more difficult and uncertain task of refuting allegations of improper motive. And that two of the plaintiffs were journalists who had previously been critical of government officials only underscores the ease with which arrestees can invoke a prior history with police as the basis for a retaliatory arrest claim under § 1983. Juries found the claims unfounded in all of these cases. Pet. Br. 37-39. In fact, as mentioned, Respondent has not identified a single case in which the arrest was supported by probable cause and a jury decided the retaliatory arrest claim in the plaintiff's favor.

Nor is qualified immunity an adequate defense against meritless claims. Although it may be available when it is unclear whether the speech allegedly leading to the arrest is protected, those cases will be few and far between. Respondent argues (Br. 52) that qualified immunity would also apply "if the court finds that under the circumstances, a reasonable officer would have made the arrest irrespective of the speech, or that the speech itself made the arrest reasonable." But as this case shows, that is not how qualified immunity works. The court of appeals ruled that it has long been established that officers may not arrest in retaliation for the suspect's exercise of First Amendment rights even if there is probable cause to do so, and that whether the officers were actually motivated by retaliatory animus is a question of fact. Pet. App. 5-6. In virtually any case where plaintiffs allege some evidence from which a conceivable inference of retaliation may be drawn, qualified immunity will not be available.

6. Respondent overstates the danger of applying *Hartman* to retaliatory arrests. Because probable cause is a strong proxy for causation, a no-probable-cause element permits recovery for clear abuses. It is telling that Respondent plays up (Br. 33) the danger of premeditated acts of retaliation by citing a case where the plaintiff's arrest was "entirely without probable cause." *Beck v. City of Upland*, 527 F.3d 853, 857 (9th Cir. 2008). As that case shows, officers cannot simply manufacture probable cause when it suits them. Several of the cases cited by Respondent's *amici* in arguing against a no-probable-cause element also involve arrests without probable cause. *Collins v. Hood*, No: 1:16-cv-00007-GHD-DAS, 2018 WL 1055526, *6 (N.D. Miss. Feb. 26, 2018); *Laning v. Doyle*, No. 3:14-cv-24, 2015 WL 710427, *7, 16 (S.D. Ohio Feb. 18, 2015); *Fernandes v. City of Jersey City*, No. 2:16-cv-07789-KM-JBC, 2017 WL 2799698, *15 (D.N.J. June 27, 2017) (cited in Br. Amicus Curiae First Amendment Foundation et al. at 13-18). A no-probable-cause element would not bar recovery there. As for other cases cited by *amici*, opinions that assume the truth of the plaintiff's account are a weak basis for concluding that there is an epidemic of retaliatory arrests going unpunished in the circuits that require the plaintiff to show no probable cause. Far more reliable are jury verdicts, which confirm that a no-probable-cause element effectively screens out meritless claims while permitting meritorious ones to proceed.

Adopting a no-probable-cause element will not license impunity, as Respondent and his *amici* suggest. *Amici*'s claim that there is "no remedy in the complaint procedures of police departments throughout the nation" is inaccurate. Br. Amicus Curiae Three

Individual Activists 27. Not only do *amici* rely on the skewed sample of U.S. Department of Justice reports, and fail to acknowledge "well-structured" accountability systems that do exist, *see, e.g.*, *Collaborative Reform Initiative: An Assessment of the San Francisco Police Department*, Cmty. Oriented Policing Servs., U.S. Dep't of Justice, at 115, 130-38 (Oct. 2016), https://ric-zai-inc.com/Publications/cops-w0817-pub.pdf, they also ignore reforms implemented in response. *See United States v. City of Seattle*, No. C12-1282JLR, Dkt. 439 at 13-14 (W.D. Wash. Jan. 10, 2018) (finding Seattle Police Department "has achieved full and effective compliance" with consent decree). Most importantly, *amici* ignore the big picture: the widespread establishment of police complaint procedures and their continuing development. As even *amici* appear to concede (Activists' Br. 13), police departments correctly recognize that it is in their own interest to ensure accountability in order to maintain the community trust necessary to their mission.

For rare instances where retaliation appears systemic, relief may be had regardless of probable cause under *Lozman*, 138 S. Ct. at 1954-55, or through federal enforcement action (as *amici* show). For claims arising out of the "mine run" of arrests, *id.* at 1954, the lack of probable cause for the arrest should be an element of the claim.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

JAHNA LINDEMUTH
Attorney General of Alaska

DARIO BORGHESAN
Counsel of Record
ANNA R. JAY
STEPHANIE GALBRAITH MOORE
1031 W. Fourth Ave.
Suite 200
Anchorage, AK 99501
(907) 269-5100
dario.borghesan@alaska.gov

Counsel for Petitioners

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
JEFFREY B. WALL
Deputy Solicitor General
MICHAEL R. HUSTON
Assistant to the Solicitor General
BARBARA L. HERWIG
LOWELL V. STURGILL JR.
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a claim for damages based on an alleged retaliatory arrest in violation of the First Amendment, brought under 42 U.S.C. 1983, is foreclosed when the arrest was supported by probable cause and the plaintiff does not allege that he was subjected to an official policy of retaliation against protected speech.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns whether a constitutional tort claim for damages under 42 U.S.C. 1983, predicated on an alleged retaliatory arrest in violation of the First Amendment, is foreclosed when the arrest was supported by probable cause and the plaintiff does not allege that he was subjected to an official policy of retaliation against his protected speech. The United States participated as amicus curiae in *Lozman* v. *City of Riviera Beach*, 138 S. Ct. 1945 (2018), which reserved that question. The United States also participated as amicus curiae in *Reichle* v. *Howards*, 566 U.S. 658 (2012), which presented the same issue in the context of a claim against federal officers under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The United States has a substantial interest in the circumstances in which federal

officers may be held liable for damages in civil actions for alleged violations of constitutional rights. It also has a substantial interest in safeguarding those rights, including through the use of federal criminal and civil enforcement authorities.

STATEMENT

1. In *Lozman* v. *City of Riviera Beach*, 138 S. Ct. 1945 (2018), this Court held that an individual can state a First Amendment retaliatory-arrest claim under 42 U.S.C. 1983 in the "unique" circumstance where he was arrested pursuant to an "official policy motivated by retaliation" against his protected speech. 138 S. Ct. at 1954. The Court recognized, however, that "the typical retaliatory arrest claim" does not involve an official policy of retaliation. *Ibid.* It involves instead an "ad hoc, on-the-spot decision by an individual officer" who may legitimately consider the arrestee's speech for law-enforcement purposes, making it "difficult to discern whether an arrest was caused by the officer's legitimate or illegitimate consideration of speech." *Id.* at 1953-1954. The Court in *Lozman* did not resolve whether, for the "mine run of arrests," the plaintiff must plausibly plead and prove the absence of probable cause to bring a retaliatory-arrest claim under Section 1983. *Id.* at 1954. This case presents that question.

2. "Arctic Man" is an extreme ski and snowmobile event held annually in the Hoodoo Mountains near Paxson, Alaska. Pet. App. 8. The event features a "remote location, large crowds, and ... high levels of alcohol abuse." *Ibid.* On the last night of Arctic Man in April 2014, Alaska State Troopers Bryce Weight and his supervisor, Sergeant Luis Nieves, were there investigating underage drinking at a party. *Ibid.* Trooper

Weight began conversing with a minor whom he suspected of consuming alcohol. J.A. 224. While Weight and the minor were talking, respondent Russell Bartlett approached with a can of beer in hand, stood face-to-face in close proximity to Weight, and loudly stated that Weight had no authority to speak to the minor. Pet. App. 9; J.A. 224-225. Trooper Weight testified later that respondent was "obviously intoxicated," that respondent used an "escalating voice" and "hostile" body language, and that respondent's continued interruptions "prevented [Weight] from conducting [his] investigation" of the minor. J.A. 225.

What happened next was captured on a private party's videotape that has been entered into the record in this case. Pet. App. 11. According to Trooper Weight's testimony, respondent raised his right hand toward Weight's face, which, coupled with respondent's angry demeanor and signs of intoxication, caused Weight to "perceive[ ] [respondent] to be a clear threat." J.A. 225. Weight responded by pushing respondent backward with open palms in order to create space for himself (a tactic Weight testified he had learned in training). *Ibid.*; Pet. App. 9. A slow-motion version of the videotape briefly shows respondent's hand held high and within inches of Weight's face at the moment of the push, Pet. App. 12, although the parties dispute whether respondent raised his hand before the push or because of it, *id.* at 9.

At the moment of the push, Sergeant Nieves was approaching. Pet. App. 9. He "observed [respondent] speaking in a loud voice and standing close to Trooper Weight." *Id.* at 3. Immediately upon seeing Weight push respondent, Nieves grabbed respondent's left arm and Weight grabbed respondent's right arm, and both

officers ordered respondent to get on the ground. *Id.* at 9. Respondent did not initially comply (he testified that he feared aggravating a previous back injury), and went down only after the officers threatened to use a Taser, at which point the officers handcuffed him. *Id.* at 9-10.

When respondent asked why he was being arrested, Sergeant Nieves said it was "[f]or harassing my trooper." Pet. App. 10. Respondent alleges, however, that the real reason for the arrest was retaliation for an interaction between himself and Nieves earlier in the evening, *id.* at 36, when Nieves had asked the owners of a keg of beer to move the beer inside their recreational vehicle so that minors would not have access to it, J.A. 140-141. The parties dispute what was said between Nieves and respondent, but they agree that respondent refused to talk with Nieves about the beer. Pet. App. 8-9; J.A. 141. After respondent was arrested, he alleges that Nieves said, "Bet you wish you would have talked to me now," a statement that respondent takes as evidence that his arrest was motivated by retaliation for his earlier lack of cooperation. Pet. App. 36-37. This alleged statement by Nieves was not captured on video and is disputed.

The next morning, Trooper Weight prepared an incident report, J.A. 10-19, and a criminal complaint, J.A. 20-30, charging respondent with disorderly conduct in violation of Alaska Stat. § 11.61.110(a) (2014), and resisting arrest in violation of Alaska Stat. § 11.56.700(a) (2014). Those charges were dismissed several months later, although the prosecutor stated that he believed probable cause existed to charge respondent with disorderly conduct, resisting arrest, and assault. Pet. App. 14; J.A. 245-246.

3. Respondent filed an action seeking damages from the officers under 42 U.S.C. 1983 (and another statute) for alleged violations of his constitutional rights. Pet. App. 15. He claimed false arrest and false imprisonment, excessive force, malicious prosecution, retaliatory arrest, and violations of the Due Process and Equal Protection Clauses. *Ibid.* The district court granted summary judgment to the officers on all claims. *Id.* at 7-39. As relevant here, the court held that respondent could not meet "the requirements necessary to support his First Amendment claim" for retaliatory arrest, because even "[c]onstruing all the facts in [his] favor," the officers "still had probable cause to arrest [him] for the crime of harassment." *Id.* at 37.

The court of appeals affirmed summary judgment for the officers on all claims except retaliatory arrest. Pet. App. 1-6. The court agreed that the officers "had at least arguable probable cause to arrest [respondent] for harassment, disorderly conduct, resisting arrest, or assault under Alaska law." *Id.* at 2-3. But the court reaffirmed that "a plaintiff can prevail on a retaliatory arrest claim even if the officers had probable cause to arrest." *Id.* at 4 (citing *Ford* v. *City of Yakima*, 706 F.3d 1188, 1195-1196 (9th Cir. 2013) (per curiam)). Because that court had established by 2014 that "an individual has a right to be free from retaliatory police action, even if probable cause existed for that action," *id.* at 5 (citation omitted), the court rejected the officers' qualified-immunity defense. Finally, the court remanded for trial, pointing to respondent's allegation "that Sergeant Nieves said 'bet you wish you would have talked to me now' after [the] arrest," which the court said a jury could conclude showed animus based on respondent's refusal to speak with Nieves earlier in the evening. *Id.* at 6.

SUMMARY OF ARGUMENT

In a typical constitutional tort action against police officers for retaliatory arrest in violation of the First Amendment, where the plaintiff does not allege that he was subjected to any official policy of retaliation, the plaintiff must plead and prove the absence of probable cause for the arrest as an element of the cause of action.

A. The common law, which provides valuable guidance on the requirements of constitutional tort actions, did not permit damages liability for a retaliatory arrest supported by probable cause. The closest common-law analogues to a retaliatory-arrest claim are the torts of malicious prosecution, which has as an element the absence of probable cause, and false imprisonment, to which the presence of probable cause provides a complete defense. Neither tort would authorize damages liability in a case like this one, where respondent's arrest was supported by probable cause but was allegedly induced by the arresting officer's retaliatory animus.

B. The common-law rules are consistent with this Court's reasoning in *Hartman* v. *Moore*, 547 U.S. 250 (2006), which held that a plaintiff bringing a constitutional tort claim of retaliatory prosecution in violation of the First Amendment must prove, as an element of the cause of action, the absence of probable cause to charge him with a criminal offense. As with retaliatory-prosecution claims, probable-cause evidence will be readily available and especially probative in a retaliatory-arrest case to prove or disprove the critical contention that the arrest was brought about by retaliatory animus. And as with retaliatory-prosecution claims, proof of the absence of probable cause provides a necessary objective screen for what would otherwise be a very difficult inquiry into causation.

In some retaliatory-arrest cases, the causation inquiry is complex because the plaintiff alleges that the arresting officer lacked animus but was induced to make the arrest by another person who did have animus. In virtually all cases, the causation inquiry is complicated because an arrest involves an "ad hoc, on-the-spot decision by an individual officer" who may legitimately consider the arrestee's speech for law-enforcement purposes, making it "difficult to discern whether an arrest was caused by the officer's legitimate or illegitimate consideration of speech." *Lozman* v. *City of Riviera Beach*, 138 S. Ct. 1945, 1953-1954 (2018). Given that "[t]here are on average about 29,000 arrests per day in this country," respondent's approach would force police officers and departments to defend against, and courts to adjudicate, a "flood[ ] [of] dubious retaliatory arrest suits"—burdensome litigation that often could not be resolved without a jury trial. *Id.* at 1953.

C. Respondent contends that adopting a no-probable-cause requirement in retaliatory-arrest cases would effectively license officers to engage in retaliation by making arrests that are supported by probable cause. But experience does not indicate that such retaliatory arrests are commonplace, and this Court should design the cause of action under 42 U.S.C. 1983 for the "mine run of arrests," not exceedingly rare cases. *Lozman*, 138 S. Ct. at 1954. Moreover, respondent is incorrect that a private damages remedy is the only way to deter such arrests. Federal, state, and local governments have enforcement tools at their disposal to remedy the First Amendment violation that occurs when an official retaliates against an individual for protected speech.

ARGUMENT

A TYPICAL DAMAGES CLAIM OF RETALIATORY ARREST IN VIOLATION OF THE FIRST AMENDMENT REQUIRES THE PLAINTIFF TO PLEAD AND PROVE THE ABSENCE OF PROBABLE CAUSE

The common law and this Court's cases strike a balance between protecting citizens against retaliation for protected expression and ensuring the ability of police officers to perform their duties free from the burdens of crippling litigation. That balance requires a plaintiff asserting a typical claim of retaliatory arrest to plead and prove the absence of probable cause. Respondent's contrary rule would enable virtually any plaintiff to get to a jury merely by alleging that the arresting officer engaged in some conduct that could plausibly be taken as evidence of retaliatory animus. This case is a good example: Despite video evidence showing that respondent was arrested immediately after an altercation with a police officer, the court of appeals held that the case must go to a jury because respondent alleges that a second officer harbored animus against him based on an earlier interaction. Pet. App. 3, 6.

A. Analogous Common-Law Torts Support Requiring Proof Of The Absence Of Probable Cause As An Element Of A Typical Retaliatory-Arrest Claim

The Court has recognized that "over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights," and those preexisting rules provide valuable guidance in defining the contours of constitutional torts. *Carey* v. *Piphus*, 435 U.S. 247, 257 (1978); see

Manuel v. *City of Joliet*, 137 S. Ct. 911, 921 (2017) (noting that "[c]ommon-law principles are meant to guide * * * the definition of [42 U.S.C.] § 1983 claims"). The Court accordingly acknowledged in *Hartman* v. *Moore*, 547 U.S. 250 (2006), that the common law may serve "as a source of inspired examples," *id.* at 258, in the context of claims against state and local officers under Section 1983 and against federal officers under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

1. a. The closest common-law analogues to respondent's claim—arising from a fairly typical warrantless arrest followed by the filing of a criminal complaint—are tort claims for false imprisonment or malicious prosecution. At common law, "[t]he gist" of false imprisonment "is an unlawful detention," *Director Gen. of R.Rs.* v. *Kastenbaum*, 263 U.S. 25, 27 (1923)—*i.e.*, a restraint on the plaintiff's freedom without lawful authorization, see Restatement (Second) of Torts §§ 35, 41 (1965) (Restatement); see also *Wallace* v. *Kato*, 549 U.S. 384, 389 (2007) ("[F]alse imprisonment is detention without legal process.") (emphasis omitted).[1] Malicious prosecution requires that the criminal charge against the plaintiff "was unfounded, and that it was made without reasonable or probable cause, and that the defendant in making or instigating it was actuated by malice." *Wheeler* v. *Nesbitt*, 65 U.S. (24 How.) 544, 549-550 (1860); see

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[1] When the challenged detention involves an arrest, some jurisdictions refer to the common-law tort of false imprisonment as "false arrest" or "malicious arrest," whereas others draw slight distinctions in "the particular circumstances which give rise" to each tort. 35 C.J.S. *False Imprisonment* § 2, at 521-522 (2009 & Supp. 2018). The terms, however, are "virtually synonymous," and any differences are not relevant here. *Ibid.*

Thomas M. Cooley, *A Treatise on the Law of Torts* 181 (1880) (Cooley); Restatement § 653 (1977). The basic difference between the torts is whether the defendant initiates a criminal proceeding against the plaintiff, which occurs either by procuring a warrant for the plaintiff's arrest, by inducing the return of an indictment or information, or when the plaintiff is validly arrested on a criminal charge, even without a warrant. Restatement § 654 & cmts. c and e (1977). If the plaintiff's arrest is valid or the defendant is prosecuted (both conditions are satisfied here), then the plaintiff's "remedy is by an action for malicious prosecution," whereas if the arrest is not valid and the plaintiff is released "without any further proceeding," then "his remedy is an action for false imprisonment." Restatement § 654 cmt. e (1977).[2]

Neither common-law tort would allow respondent to recover in this case, where the officers had probable cause to arrest him. It is well settled that the absence of probable cause is an element of a malicious-prosecution claim. Restatement § 653 (1977); see, *e.g.*, *Hartman*, 547 U.S. at 258; *Brown* v. *Selfridge*, 224 U.S. 189, 191 (1912) ("It is settled law that in an action of this kind the burden of proving malice and the want of probable cause is upon the plaintiff."); *Wheeler*, 65 U.S. at 550 ("Want of reasonable and probable cause is as much an

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[2] In *Hartman*, this Court considered whether a claim under Section 1983 for retaliatory prosecution was more like a common-law claim for malicious prosecution or abuse of process. 547 U.S. at 258. A retaliatory-arrest claim is not analogous to the tort of abuse of process, which "is concerned with the wrongful use of process after it has been issued," whereas malicious prosecution concerns the wrongful initiation of criminal proceedings in the first instance. 54 C.J.S. *Malicious Prosecution* § 4, at 738 (2010).

element in the action for a malicious criminal prosecution as the evil motive which prompted the prosecutor to make the accusation * * * and must be proved by the plaintiff by some affirmative evidence."); *Hogg* v. *Pinckney*, 16 S.C. 387, 393 (1882); *Turner* v. *O'Brien*, 5 Neb. 542, 543-544 (1877); *Boyd* v. *Cross*, 35 Md. 194, 196 (1872); *Ahern* v. *Collins*, 39 Mo. 145, 150 (1866); see also Cooley 181, 184.

For false imprisonment, the presence of probable cause is a complete defense. A defendant in a false-imprisonment case can avoid liability by showing that he made a "privileged" arrest, Restatement § 118 & cmt. b (1965); see 1 Dan B. Dobbs et al., *The Law of Torts* § 94, at 289-290 (2d ed. 2011) (Dobbs), and a "peace officer" is privileged to arrest someone whom he "reasonably suspects" has committed an offense in his presence, Restatement §§ 114, 119(b)-(c), 121 (1965); see Dobbs § 94, at 291-293 (warrantless arrest supported by probable cause is privileged); see also *Kastenbaum*, 263 U.S. at 27 ("[T]he burden is on the defendant to establish probable cause for the arrest."); *Fox* v. *McCurnin*, 218 N.W. 499, 502 (Iowa 1928); *Rohan* v. *Sawin*, 59 Mass. (5 Cush.) 281, 287-288 (1850).[3]

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[3] Some jurisdictions traditionally limited the authority to make warrantless arrests for minor offenses, see *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 328-332 (2001), leading some state courts to say that probable cause does not provide a full justification against a claim for false imprisonment. See, *e.g.*, *Adair* v. *Williams*, 210 P. 853, 857 (Ariz. 1922); see also Pet. Br. 44 (stating that "[p]robable cause *usually* defeated a claim of false imprisonment at common law" and noting exceptions involving arrests by "private citizens" as opposed to "peace officers") (emphasis added). It would be more precise to say that, in those cases, the arrest was not *privileged*

For either tort at common law, the officer's motives were irrelevant if probable cause existed. It has long been the rule that "if there was probable cause, an action for malicious prosecution will not lie, although the party who procured the arrest or indictment was actuated by malicious motives." *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390, 402 (1852); see 3 William Blackstone, *Commentaries on the Laws of England* 127 (1768). And for false imprisonment, "the fact that [an officer] has an ulterior motive * * * does not make the arrest unprivileged," provided the arrest is made in the course of enforcing the law. Restatement § 127 cmt. a (1965). So, for example, if "A, a traffic officer, arrests B for driving at the rate of 20 miles an hour through a town in which the rate of speed is fixed by an ordinance at 15 miles an hour," A has not falsely imprisoned B, even if A made the arrest "because B was a personal enemy, or because B had previously reported him for his failure to arrest persons driving at 25 miles an hour." Restatement § 127 cmt. a, illus. 1 (1965).

Courts at common law treated the absence of probable cause as central to claims of false imprisonment or malicious prosecution because it would not "be wise as a matter of public policy, to throw down the bars which protect public officers from suits for acts done within the scope of their duty and authority, by recognizing the right of every one who chooses to imagine or assert that

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under the governing law, despite probable cause. See *Yeatts* v. *Minton*, 177 S.E.2d 646, 649 (Va. 1970). By contrast, all arrests supported by probable cause are privileged for purposes of the federal Constitution. See *Virginia* v. *Moore*, 553 U.S. 164, 171 (2008) (explaining that a "long line of cases" holds that a warrantless arrest supported by probable cause, even for a "minor" offense, is "constitutionally reasonable" under the Fourth Amendment).

he is aggrieved by their doings, to make use of an allegation that they were malicious in motive to harass them with suits on that ground." *Chesley* v. *King*, 74 Me. 164, 175-176 (1882); see Cooley 175. The danger of respondent's approach, courts recognized when applying the common law, is that "[l]itigation would be endless if the motives of those who are simply enforcing a legal claim were made the subjects of inquiry." *Chesley*, 74 Me. at 175; see *Ledwith* v. *Catchpole*, 2 Cald. 291, 295 (K.B. 1783) (probable-cause bar to damages was necessary to prevent the threat of liability from dissuading an officer from performing his duties).

b. Some supporters of respondent's rule have attempted to ground their approach in common-law authorities. For instance, the plaintiff in *Lozman* v. *City of Riviera Beach*, 138 S. Ct. 1945 (2018), conceded that probable cause was a complete bar to common-law claims of malicious prosecution, but relied on language in *Dinsman*, 53 U.S. at 402, to argue that the common law treated probable cause as merely an evidentiary consideration in false-imprisonment cases. See, *e.g.*, Merits Reply Br. at 3-4, *Lozman*, *supra* (No. 17-21). *Dinsman*, however, had nothing to do with an arrest for a criminal offense supported by probable cause: the plaintiff was a military sailor imprisoned in a fort by his commander for refusing to perform his duty. 53 U.S. at 402-403. Although *Dinsman* noted that evidence of the commander's motive was potentially relevant to whether his military discipline of the plaintiff was proper, see *id.* at 402, that is not the common-law standard for peace officers effecting arrests.

Nor does it matter that the common law may have allowed a false-imprisonment claim if the defendant

never intended "to bring [the plaintiff] before a magistrate for commitment," but made the arrest only to extort some action by the arrestee in return for his release. Restatement § 127 cmt. a, illus. 2 (1965); see Merits Reply Br. at 4-5, *Lozman*, *supra* (No. 17-21). First, no such allegation exists here: Trooper Weight filed a criminal complaint against respondent promptly after his arrest, J.A. 20-30, and respondent does not dispute that he was later arraigned before a magistrate. Second, even when a person is arrested with probable cause but is released without charge, he typically claims that the arrest was retaliatory (for instance, retribution for protected expression)—not that the arrest was meant to induce some other action. Challenging a "catch-and-release" arrest as an attempt at leverage is not the same as alleging that an officer who *did* intend to pursue charges and had probable cause for doing so nevertheless acted from a retaliatory motive. However the common law treated the former, it did not permit a plaintiff to recover damages for the latter.

2. The common law is less clear on whether an officer is required, at the time of arrest or shortly thereafter, to correctly state the crime for which probable cause existed. Compare Dobbs § 94, at 291 ("The defendant attempting an arrest without a warrant must normally state his intention to make an arrest and the grounds for it, although he need not accurately state the precise crime involved."), with Annotation, 64 A.L.R. 653 (1930) ("A person unlawfully arresting another for one offense cannot, when sued for false imprisonment, justify on the ground that the one arrested was guilty of some other offense, for which the arrest under the circumstances would have been legal, or because reasonable grounds existed for an arrest for such other

offense."). That issue is not presented here, because within hours of respondent's arrest Trooper Weight charged him with disorderly conduct and resisting arrest, J.A. 20-30, and the court of appeals affirmed that probable cause existed for those offenses (plus two others), Pet. App. 2-3.

Should the Court nevertheless reach the question, it should adopt the same rule that applies to challenges to arrests under the Fourth Amendment: probable cause for an offense justifies an arrest even if the officer did not specify that offense at the time of the arrest. See *Devenpeck* v. *Alford*, 543 U.S. 146, 153-155 (2004). That rule is sound because officers are trained to make arrests based on a course of conduct, not to master the elements of each offense in the legal code. See *Illinois* v. *Gates*, 462 U.S. 213, 231-232 (1983) (probable cause arises from "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act") (citation omitted); *Heien* v. *North Carolina*, 135 S. Ct. 530, 539 (2014) (noting "the reality that an officer may 'suddenly confront' a situation in the field as to which the application of a statute is unclear—however clear it may later become") (citation omitted). For that reason, if the Court departs from *Devenpeck* at all, it should require a retaliatory-arrest plaintiff to show the absence of probable cause for those offenses charged before the plaintiff's criminal trial or asserted at the pleading stage of the civil litigation.

B. This Court's Decision In *Hartman* Supports Requiring Proof Of The Absence Of Probable Cause As An Element Of A Typical Retaliatory-Arrest Claim

The common-law rules emphasizing the importance of probable cause accord with this Court's decision in *Hartman*, which held that the absence of probable

cause is an element of a claim of retaliatory prosecution in violation of the First Amendment brought under *Bivens* and Section 1983. 547 U.S. at 265-266. The Court relied on two features of retaliatory-prosecution claims. First, "evidence showing whether there was or was not probable cause to bring the criminal charge" will "always" provide "a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove" the critical question of "retaliatory causation." *Id.* at 261. Second, the Court observed that "the requisite causation between the defendant's retaliatory animus and the plaintiff's injury" in a retaliatory-prosecution case "is usually more complex than it is in other retaliation cases." *Ibid.* Both of those considerations weigh in favor of requiring the plaintiff to plead and prove a lack of probable cause as an element of a retaliatory-arrest tort action. See *Reichle* v. *Howards*, 566 U.S. 658, 667 (2012) (noting "the close relationship between retaliatory arrest and prosecution claims").

1. As in the context of retaliatory prosecution, a claim of retaliatory arrest will implicate "a distinct body of highly valuable circumstantial" probable-cause evidence that is "apt to prove or disprove retaliatory causation." *Hartman*, 547 U.S. at 261; see *Reichle*, 566 U.S. at 668 ("Like retaliatory prosecution cases, evidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case."). And no less than for a criminal prosecution, probable cause for an arrest provides an objective standard by which to judge the propriety of that arrest; the existence of probable cause generally provides a "legal justification" for an arrest under the Fourth Amendment irrespective of the "actual motivations of the individual officers involved." *Whren* v. *United States*, 517 U.S.

806, 812-813 (1996) (defendant challenging his arrest in a criminal proceeding must establish the absence of probable cause); see *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 354 (2001) (same for constitutional tort plaintiff challenging his arrest under 42 U.S.C. 1983). This Court has explained that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Devenpeck*, 543 U.S. at 153 (citation omitted).

"[E]stablishing the existence of probable cause" in a retaliatory-arrest case will therefore "suggest that [the arrest] would have occurred even without a retaliatory motive," whereas demonstrating "that there was no probable cause for the [arrest] will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for" the arrest. *Hartman*, 547 U.S. at 261. Probable cause is no less forceful in assessing the reason for an arrest than in assessing the reason for a criminal prosecution. Moreover, as with claims of retaliatory prosecution, the issue of probable cause is "likely to be raised by some party at some point" in a retaliatory-arrest case, "owing to its powerful evidentiary significance," so it adds little, if any, practical burden to require a plaintiff to demonstrate the absence of probable cause. *Id.* at 261, 265.

2. Retaliatory-arrest cases also resemble retaliatory-prosecution cases with regard to the complexity of the causal connection between animus and the challenged action. In both types of cases, the retaliation inquiry "is usually more complex than it is in other retaliation cases," thus "support[ing] a requirement that no probable cause be alleged and proven." *Hartman*, 547 U.S. at 261; see *Reichle*, 566 U.S. at 668 (noting that both

retaliatory-arrest and retaliatory-prosecution cases are susceptible to a "tenuous causal connection between the defendant's alleged animus and the plaintiff's injury").

a. A retaliatory-arrest claim may involve the same specific complexity present in *Hartman*: a lack of identity between the person alleged to have a retaliatory motive and the official who took the challenged action. In retaliatory-prosecution cases, of course, the reason for the lack of identity is that the claim "will not be brought against the prosecutor, who is absolutely immune," but instead against someone else for allegedly inducing the prosecution. *Hartman*, 547 U.S. at 262. Similarly, plaintiffs sometimes allege that they were arrested by an officer who lacked retaliatory animus but who was induced to make the arrest by another official with such animus. See, *e.g.*, *Curley* v. *Village of Suffern*, 268 F.3d 65, 68, 72-73 (2d Cir. 2001) (allegation that police officers' decision to arrest plaintiff in connection with a bar fight was induced by local officials' retaliatory animus against plaintiff); see also *Mocek* v. *City of Albuquerque*, 813 F.3d 912, 920-921 (10th Cir. 2015) (allegation that federal agent of the Transportation Security Administration (TSA) induced an arrest by a local police officer in retaliation for plaintiff's repeated refusal to provide his identification at an airport checkpoint); TSA Management Directive No. 1100.88-1 (TSA agents lack arrest authority).

This case demonstrates the difficulties of assessing causation when multiple officers are involved in an arrest. The court of appeals held that respondent had introduced evidence sufficient for a jury to conclude that, well before his arrest, Sergeant Nieves developed retaliatory animus against respondent for refusing to talk with him about a keg of beer. See Pet. App. 6. But

it was *Trooper Weight* who was the target of respondent's later belligerent behavior, see *id.* at 3, 9, and it was Weight, not Nieves, who identified himself as the primary officer on the arrest report and signed the criminal charges against respondent, see J.A. 10-19, 20-30. Insofar as Weight is responsible for the arrest, respondent's claim that the arrest was induced by Nieves's retaliatory animus involves the same difficulty in "bridging the causal gap" that the Court noted in *Hartman*. 547 U.S. at 264.

The Court in *Hartman* gave as an "added" reason to require proof of probable cause in retaliatory-prosecution cases the "presumption of regularity" afforded to "prosecutorial decisionmaking." 547 U.S. at 263. That presumption does not apply in the same way in cases involving arrests, *Reichle*, 566 U.S. at 669, but its absence does not diminish the "powerful evidentiary significance" of probable cause in that context, *Hartman*, 547 U.S. at 261. Moreover, this Court has held that the existence of probable cause establishes as a matter of law that "the balanc[e] of private and public interests" favors an arrest and that an officer's decision to arrest is "constitutionally reasonable" under the Fourth Amendment. *Virginia* v. *Moore*, 553 U.S. 164, 171 (2008). Thus, in much the same way that the presumption of regularity for prosecutions cuts against a suspect's claim that his criminal charges grew out of animus, the fact that an arrest supported by probable cause is *per se* reasonable cuts against a suspect's claim that his arrest was induced by animus.

b. Even when only one officer is involved in an arrest, the causation inquiry is typically even more difficult than in a retaliatory-prosecution case for at least two reasons. First, whereas the initiation of criminal

proceedings generally affords time for legal analysis that undercuts claims of retaliation, police officers are "often" called upon to make "split-second judgments" "[i]n deciding whether to arrest." *Lozman*, 138 S. Ct. at 1953. This case is emblematic: Trooper Weight testified that he perceived respondent's behavior as "hostile and aggressive" and "combative in nature," Pet. App. 10 (citation omitted), and he made an on-the-spot judgment for his own safety to shove respondent backward, which precipitated respondent's arrest, see *id.* at 3; J.A. 225-226. Warrantless arrests frequently call for similar judgments about when a suspect's behavior rises to a level that justifies arrest, but the nature of those subjective judgments means that, without the objective screen of probable cause, police officers will usually lack the sort of evidence that would conclusively demonstrate that animus played no role in the arrest.

Second and relatedly, in deciding whether to make an arrest, it is often entirely legitimate, and even necessary, for a police officer to consider "[t]he content of the suspect's speech." *Lozman*, 138 S. Ct. at 1953; see *Reichle*, 566 U.S. at 668 ("Like retaliatory prosecution cases, * * * the connection between alleged animus and injury may be weakened in the arrest context by a police officer's wholly legitimate consideration of speech."). The suspect's expressive activity may itself provide the probable cause for an arrest. See, *e.g.*, *Wayte* v. *United States*, 470 U.S. 598, 612-613 (1985) (protest letters sent to Selective Service "provided strong, perhaps conclusive evidence" of an element of the criminal offense of failing to register for the draft); *Dukore* v. *District of Columbia*, 799 F.3d 1137, 1139 (D.C. Cir. 2015) (plaintiffs claimed retaliation when they were arrested, after multiple warnings, for staging a protest by sitting in

tents outside an office building in downtown Washington, D.C., in violation of temporary-abode regulation); see also 40 U.S.C. 6135 ("It is unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display in the Building and grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement.").

Other times, the content and manner of the suspect's expression bears directly on an officer's decision "whether the suspect is ready to cooperate, or, on the other hand, whether he may present a continuing threat to interests that the law must protect." *Lozman*, 138 S. Ct. at 1953; see *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 587 (2018) ("[T]he vagueness and implausibility of the [suspects'] stories * * * suggested a guilty mind."). That is what happened here: Trooper Weight testified that he perceived respondent to be a threat based on a combination of the content of respondent's speech, his body language, and his inebriated state. See J.A. 225.

These circumstances of everyday policing distinguish retaliatory-arrest claims from other settings where there is usually more time for decisionmaking, speech may not be a relevant consideration, and defendants may be able to offer objective evidence of a nonretaliatory motive. See, *e.g.*, *Board of Cnty. Comm'rs* v. *Umbehr*, 518 U.S. 668, 677-680 (1996) (contract termination); *Rankin* v. *McPherson*, 483 U.S. 378, 383-384 (1987) (termination or denial of public employment); *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) (denial or withholding of public benefits). In those cases, the burden-shifting framework of *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977),

requires the plaintiff to come forward with prima facie evidence that protected speech was a "substantial" or "motivating" factor in bringing about the adverse action, *id.* at 287, which shifts the burden to the defendant to prove by a preponderance of the evidence that he would have taken the same action "even without the impetus to retaliate," *Hartman*, 547 U.S. at 260 (citing *Mt. Healthy*, 429 U.S. at 287).

Applying the *Mt. Healthy* framework to retaliatory-arrest cases, however, would routinely shift the burden to defendants, because "an official's state of mind is 'easy to allege and hard to disprove.'" *Crawford-El* v. *Britton*, 523 U.S. 574, 584-585 (1998) (citation omitted). Without the objective screen of probable cause, it will be "difficult to discern whether an arrest was caused by the officer's legitimate or illegitimate consideration of speech," *Lozman*, 138 S. Ct. at 1953, and such "questions of subjective intent so rarely can be decided by summary judgment," *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982). Given that "[t]here are on average about 29,000 arrests per day in this country," *Lozman*, 138 S. Ct. at 1953, the consequences of respondent's approach for law enforcement and the judiciary would be severe. Police officers and departments would be forced to defend against, and courts would be required to adjudicate, a "flood[ ] [of] dubious retaliatory arrest suits." *Ibid.* By contrast, requiring an analysis of probable cause at the earliest possible stage of the case as an element of the plaintiff's cause of action would protect officers in such cases from the serious burdens of discovery and trial. See *Crawford-El*, 523 U.S. at 585.

c. A police officer's need to permissibly consider speech in deciding whether to arrest also distinguishes claims of retaliatory arrest in violation of the First

Amendment from equal-protection claims under the Fourteenth Amendment. This Court has noted that although an officer's subjective motivation is irrelevant to whether an arrest supported by probable cause is lawful under the Fourth Amendment, equal-protection principles would still "prohibit[ ] selective enforcement of the law based on considerations such as race" in similar circumstances. *Whren*, 517 U.S. at 813. But that observation does not indicate that an arrest supported by probable cause could give rise to damages liability in a tort action for retaliatory arrest in violation of the First Amendment. Unlike expressive activity, immutable characteristics such as race will "seldom provide a relevant basis for disparate treatment." *Fisher* v. *University of Tex. at Austin*, 133 S. Ct. 2411, 2418 (2013) (citations omitted).

Moreover, an equal-protection claim based on such disparate treatment already includes a stringent objective screen, requiring detailed proof that the government in fact treated similarly situated people differently. See *United States* v. *Armstrong*, 517 U.S. 456, 458 (1996). The anomaly of respondent's approach is that retaliatory-arrest claims alone would lack an objective screen under Section 1983. Plaintiffs who bring Section 1983 actions for other alleged violations of the First Amendment (*e.g.*, retaliatory prosecution) or Fourth Amendment have to plausibly plead and prove the absence of probable cause; and those who allege violations of the Fourteenth Amendment have to plausibly plead and prove differential treatment of similarly situated people. By contrast, the court of appeals here held that respondent was entitled to go to the jury based solely on an allegation that one officer made an

ambiguous statement that could be interpreted as evidence of improper motive. Pet. App. 6. Respondent and the court of appeals have pointed to no reason why retaliatory-arrest claims alone should involve nothing more than a subjective inquiry into officers' motives.

C. A Damages Remedy Is Not Essential To Deter Police Officers From Making Retaliatory Arrests Supported By Probable Cause

This Court should not depart from the reasoning of the common law and *Hartman* to guard against the possibility that police officers will retaliate against speakers with unpopular views by arresting them for minor offenses supported by probable cause. Evidence from reported cases suggests that, although allegations of retaliation are common, actual retaliatory arrests supported by probable cause are relatively rare, and other civil and criminal enforcement tools can guard against potential abuses.

1. Respondent has not pointed to any evidence that retaliatory arrests supported by probable cause are prevalent. First, there is no indication that the common-law rule for analogous torts produced a flood of retaliatory arrests. Second, most courts of appeals to address the question have required retaliatory-arrest plaintiffs to establish the absence of probable cause, and there is no indication that approach has produced a great many retaliatory arrests. Third, even in the minority of circuits that use the *Mt. Healthy* standard for First Amendment retaliatory-arrest claims, the government has not located a single case since *Hartman* in which a jury actually found that retaliation was the but-for cause of the plaintiff's arrest although the arrest was supported by probable cause.

To be sure, there are rare cases in which a jury reasonably could so find based on evidence of retaliation against protected expression. See *Stone* v. *Juarez*, No. 05-cv-508, 2006 WL 1305039, at *14 (D.N.M. Apr. 23, 2006) (arresting officer admitted that, although he had probable cause, he did not intend to arrest the plaintiff until the plaintiff used an expletive in a crowded mall with families present). But even granting such rare cases, the Court should define the elements of a retaliatory-arrest claim under Section 1983 to account for the "mine run of arrests." *Lozman*, 138 S. Ct. at 1954. The Court in *Hartman* recognized that a constitutional tort claim should not be structured around exceptional instances of retaliatory animus. See 547 U.S. at 264; see also *Atwater*, 532 U.S. at 353-354. Indeed, the Court refused to "dispens[e] with [the] requirement to show no probable cause [even] when a plaintiff has evidence of a direct admission" of retaliatory animus, because such an "exemption" would quickly swallow the rule and simply move the parties' debate to "hassles" over whether the defendant had made an adequately clear admission. *Hartman*, 547 U.S. at 264 n.10.

2. a. The vast bulk of reported cases in which plaintiffs have alleged retaliatory arrests in violation of the First Amendment despite the existence of probable cause can be grouped into three categories. Surveying the categories demonstrates why respondent's approach is an invitation to a "flood[ ] [of] dubious retaliatory arrest suits." *Lozman*, 138 S. Ct. 1953.[4]

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[4] This case will not affect retaliatory-arrest claims where officers lacked probable cause for the arrest or where factual disputes preclude a determination regarding probable cause. See, *e.g.*, *Tobey* v. *Jones*, 706 F.3d 379, 392 (4th Cir. 2013).

In the first category, the suspect refused to comply with a lawful instruction from an officer or another governmental official. Sometimes this refusal was part of a protest, as with the plaintiff who refused to vacate his unlawful sidewalk tent in *Dukore*, 799 F.3d at 1139. Other times, the plaintiff refused to comply with an officer's attempt to protect public safety or preserve order. See, *e.g.*, *Mocek*, 813 F.3d at 920-921 (plaintiff repeatedly refused to provide his identification to a TSA agent at an airport checkpoint); *McCabe* v. *Parker*, 608 F.3d 1068, 1072, 1076 (8th Cir. 2010) (plaintiffs refused instructions from the Secret Service regarding where they were allowed to stand at a Presidential rally); *Johnson* v. *Hollins*, 716 Fed. Appx. 248, 250 (5th Cir. 2017) (per curiam) (plaintiff refused officer's instruction to leave the area of a car accident after acting belligerently toward another driver).

In the second category, the suspect was arrested following behavior that was disorderly, disruptive, or threatening. For example, in *Wilson* v. *Village of Los Lunas*, 572 Fed. Appx. 635 (10th Cir. 2014), the plaintiff was arrested after he refused an officer's instructions at a traffic stop, then resisted and kicked the officer, *id.* at 636, but he alleged that he was arrested because, during the stop, he complained about his prior experience with the police, *id.* at 642. In *Lash* v. *Lemke*, 786 F.3d 1 (D.C. Cir. 2015), a protestor confronted police officers by challenging their presence and purpose, shouting obscenities, and tearing down some of the officers' public notices. *Id.* at 3-4. He then resisted when officers tried to subdue him and was arrested and charged with disorderly conduct. *Ibid.* And here respondent was arrested both for disorderly conduct (based on conduct that Trooper Weight and Sergeant Nieves perceived to

be threatening and harassing) and resisting arrest. Pet. App. 3.

In the third category, the arrest was facially unrelated to protected expression, but the plaintiff alleged that the arrest was in retaliation for earlier speech. For example, in *Curley* v. *Village of Suffern*, the plaintiff admitted to a police officer that he had hit another person during a bar fight, so he was arrested for assault and disorderly conduct. 268 F.3d at 69. The plaintiff alleged, however, that the officers arrested him in retaliation for accusations that he had made months earlier during his unsuccessful mayoral campaign. *Id.* at 73. In *Galarnyk* v. *Fraser*, 687 F.3d 1070 (8th Cir. 2012), the plaintiff entered without authorization a governmental trailer at the site of a collapsed bridge, interrupted a meeting, and criticized the officials present. *Id.* at 1072. He was arrested for trespass, *id.* at 1074, but alleged that the arrest was in retaliation for his previous public criticisms of the government's handling of the bridge incident, *id.* at 1072-1073.

b. As all of these cases illustrate, unless the absence of probable cause is an element of a First Amendment retaliatory-arrest claim under Section 1983, there will be little to prevent a plaintiff from pressing the factual question of an officer's motive all the way to a jury. Motions to dismiss are unlikely to be effective, because a plaintiff's factual allegations must be taken as true at the pleading stage, including allegations that the arresting officer made a statement or engaged in conduct plausibly evidencing a retaliatory motive. See *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). Summary judgment will typically be unavailable for similar reasons, because factual inferences must be drawn in favor of the nonmoving party and causation is usually an issue of fact.

See *Harlow*, 457 U.S. at 816; Pet. App. 5-6. Likewise, qualified immunity will not be available, because the parties' dispute will not be over whether it is lawful to make an arrest supported by probable cause for the purpose of retaliating based on the exercise of First Amendment rights, but whether in fact that is what the officer did in a particular case. See Pet. App. 5.

The court of appeals has recognized that its rule would likely defeat summary judgment in almost every retaliatory-arrest case, and thereby increase "the disruption caused" to police officers "by unfounded claims." *Dietrich* v. *John Ascuaga's Nugget*, 548 F.3d 892, 901 (9th Cir. 2008) (citation omitted). That court has attempted to mitigate those harms by holding that summary judgment may be appropriate in cases where evidence of probable cause is "strong" and evidence of retaliatory motive is "weak." *Ibid.*; see, *e.g.*, *Maidhof* v. *Celaya*, 641 Fed. Appx. 734, 735 (9th Cir. 2016) (reversing denial of summary judgment based on *Dietrich* because "[p]laintiffs' evidence of retaliatory intent [was] weak"). The Ninth Circuit has thus altered the rules of summary judgment to compensate for the damage done by an overbroad conception of the Section 1983 tort. Rather than manipulate the summary-judgment standard for retaliatory-arrest claims, the proper course is to define the elements of that claim in the same way as a First Amendment retaliatory-prosecution claim or a Fourth Amendment unreasonable-seizure claim. See *supra*, pp. 15-24.

3. a. Finally, respondent is mistaken that only a private damages remedy will deter governmental officials from using probable cause for minor offenses as a pretext for retaliatory arrests. Although the First Amendment confers a "general right to be free from retaliation

for one's speech, *Reichle*, 566 U.S. at 665; see *Hartman*, 547 U.S. at 256, not every violation of that right necessitates the particular remedy of a tort action for damages. For example, in the context of suits against federal officers under *Bivens*, the Court has held that a judicially created damages remedy is not appropriate for every constitutional violation—indeed, "in most instances" this Court has "found a *Bivens* remedy unjustified." *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007); see, *e.g.*, *Bush* v. *Lucas*, 462 U.S. 367, 390 (1983) (declining to recognize a damages remedy under *Bivens* for violation of a federal employee's First Amendment rights); see also *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1857 (2017) (listing numerous constitutional claims for which the Court has declined to create an implied damages remedy).

The Court has likewise interpreted Section 1983 to authorize damages only for acts found to "violat[e] * * * constitutional rights *and to have caused compensable injury*." *Carey*, 435 U.S. at 255 (quoting *Wood* v. *Strickland*, 420 U.S. 308, 319 (1975)). The Court has explained that "the elements of, and rules associated with, an action seeking damages" for such injuries under Section 1983 may reflect practical considerations and limitations that preclude monetary recovery even if "'the specific constitutional right' at issue" has been violated. *Manuel*, 137 S. Ct. at 920 (citation omitted); see *id.* at 920-921 (noting that limitations on damages actions for malicious prosecution may preclude recovery for Fourth Amendment violations in some circumstances). The Court has thus rejected (as did the common law) the premise of respondent's view: that a private cause of action for damages is necessary to protect the First Amendment right to be free from retaliatory arrests.

b. Although the Court in *Hartman* did not expressly decide whether its no-probable-cause requirement for retaliatory-prosecution claims was a limitation on the scope of the First Amendment, see *Reichle*, 566 U.S. at 669 n.6, it clearly conceived of that requirement as restraining a plaintiff's ability to obtain damages in a constitutional tort suit alleging retaliatory prosecution. The Court stated that its "holding d[id] not go beyond a definition of an element of the tort," *Hartman*, 547 U.S. at 257 n.5, and it relied heavily on the practical difficulties in pleading and proving that tort in determining that it "makes sense to require" the absence of probable cause "as an element of a plaintiff's case," *id.* at 265-266. The Court observed that the presence or absence of probable cause is not perfect evidence of whether a constitutional violation occurred, but is sufficiently probative of causation to warrant requiring that showing as a prerequisite to recovering damages. See *id.* at 265.

Because the no-probable-cause requirement is a limitation on the availability of a damages action under Section 1983, rather than on the scope of the First Amendment itself, there are other available remedies if officers engage in retaliatory arrests notwithstanding the existence of probable cause. The United States, for example, can prosecute officers who willfully violate individuals' constitutional rights under color of law (or who conspire to do so) by subjecting citizens to arrest in retaliation for their protected speech, even if those arrests are supported by probable cause. See 18 U.S.C. 241, 242. The United States can also bring civil actions against state and local law-enforcement agencies under 34 U.S.C. 12601 (formerly codified at 42 U.S.C. 14141 (2012)) to remedy a pattern or practice of retaliatory

arrests by law-enforcement officers, including in circumstances where probable cause may have existed for individual arrests. Several States also have statutes that may authorize criminal prosecution of police officers who violate individuals' rights under color of law.[5] Particularly in light of the increasing use of video cameras by police departments, there is no reason to assume that clear instances of retaliation will frequently escape sanction.[6]

Government enforcement actions under the statutes identified above are appropriately limited by proof requirements that do not exist in the context of individual tort suits under Section 1983 or *Bivens*. Criminal prosecutions under 18 U.S.C. 242 require the government to establish "willful[ness]" and to prove unlawful

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[5] See, *e.g.*, Ark. Code Ann. § 5-52-107 (Supp. 2017); Colo. Rev. Stat. § 18-8-403 (2017); Del. Code Ann. tit. 11, § 1211 (2015); 720 Ill. Comp. Stat. Ann. 5/33-3 (West Supp. 2018); Iowa Code Ann. § 721.2(3) (West 2013); Ky. Rev. Stat. Ann. §§ 522.020, 522.030 (LexisNexis 2014); Minn. Stat. Ann. § 609.43 (West 2018); Mont. Code Ann. § 45-7-401 (2017); Neb. Rev. Stat. Ann. § 28-926 (LexisNexis 2015); N.H. Rev. Stat. Ann. § 643:1 (LexisNexis 2015); N.J. Stat. Ann. § 2C:30-2 (West 2016); N.Y. Penal Law § 195.00 (McKinney 2010); N.D. Cent. Code § 12.1-14-05 (2012); 18 Pa. Cons. Stat. Ann. § 5301 (West 2015); Tenn. Code Ann. § 39-16-403 (2014); Tex. Penal Code Ann. § 39.02 (West 2016); Utah Code Ann. § 76-8-201 (LexisNexis 2017); Wash. Rev. Code Ann. § 9A.80.010 (West 2015). Some States further authorize the state attorney general to bring civil suits against police departments for patterns or practices that violate individual rights. See Cal. Civ. Code § 52.3(b) (West 2007); Fla. Stat. Ann. § 760.021 (West 2016).

[6] See, *e.g.*, U.S. Dep't of Justice, *Department of Justice Awards Over $20 Million to Law Enforcement Body-Worn Camera Programs* (Sept. 6, 2016), https://www.justice.gov/opa/pr/department-justice-awards-over-20-million-law-enforcement-body-worn-camera-programs.

retaliation beyond a reasonable doubt. A pattern-or-practice claim requires the government to show a "systemwide" violation of constitutional rights, not simply "isolated" or "sporadic" acts. *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 336 (1977) (discussing pattern or practice of employment discrimination). And the appropriate exercise of prosecutorial discretion ensures that the public interest will be weighed in determining whether a civil or criminal action is appropriate under the circumstances.

Those factors guard against unwarranted intrusions on the ability of police officers to make arrests, while ensuring that, in the limited class of cases where both probable cause and retaliatory motive exist, constitutional rights receive protection. The absence of those factors in private damages suits, however, underscores the need for the objective screen provided by *Hartman*'s no-probable-cause requirement. Cf. *Maryland* v. *Pringle*, 540 U.S. 366, 370 (2003) ("The long-prevailing standard of probable cause protects citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime, while giving fair leeway for enforcing the law in the community's protection.") (citation and internal quotation marks omitted). The lack of probable cause is therefore an appropriate element in a retaliatory-arrest tort action, but it need not license retaliatory arrests supported by probable cause. Governmental civil and criminal enforcement continues to be an important backstop for safeguarding constitutional rights even where limitations on private causes of action for damages do not permit individual tort claims.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
JEFFREY B. WALL
Deputy Solicitor General
MICHAEL R. HUSTON
Assistant to the Solicitor General
BARBARA L. HERWIG
LOWELL V. STURGILL JR.
Attorneys

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IN THE

Supreme Court of the United States

LUIS A. NIEVES, ET AL.,

Petitioners,

v.

RUSSELL P. BARTLETT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
BRIAN R. FRAZELLE
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

* Counsel of Record

October 9, 2018

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and in the scope of the First Amendment rights that are protected by 42 U.S.C. § 1983.

INTRODUCTION AND SUMMARY OF ARGUMENT

Russell Bartlett alleges that Petitioners Luis Nieves and Bryce Weight arrested him in retaliation for exercising his First Amendment rights—that is, because he verbally protested what he believed to be improper conduct by the officers. Petitioners argue that even if this is true, Bartlett is prohibited from seeking damages under 42 U.S.C. § 1983 for First Amendment retaliatory arrest because they had probable cause to arrest him for "harassment" under Alaska law—a crime with which he was never charged. Pet. App. 12-13. Their position is that no one in Bartlett's position may seek redress under Section 1983 if there was probable cause to arrest that

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

person for any crime, no matter how minor, and regardless of whether the actual reason for the arrest was retaliation.

This position is at odds with the text of Section 1983, contradicts the history that led to its enactment, and undermines the statute's manifest purpose. Moreover, contrary to Petitioners' contentions, state common law rules that existed when Section 1983 was enacted provide no justification for the result they seek.

Importantly, this case is about a federal statute—42 U.S.C. § 1983—and so this Court's decision should turn on the proper interpretation of that statute. Throughout Petitioners' brief, there is little indication of that. Instead, Petitioners invite this Court to base its decision on the Court's own views about what would be best for society—specifically, what rules would strike the ideal balance between the value of protecting free speech and the importance of shielding police officers from lawsuits. But this is not a *Bivens* case, in which the judiciary is crafting "an implied cause of action," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856-57 (2017), nor is the Court here fashioning "federal general common law," *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The question is whether the statute under which Bartlett seeks relief, first enacted by Congress in 1871, imposes the rule Petitioners advocate.

It does not. Section 1983 was a key part of "extraordinary legislation," Cong. Globe, 42nd Cong., 1st Sess. 322 (1871) (hereinafter "Globe") (Rep. Stoughton), that was enacted during Reconstruction to "alter[] the relationship between the States and the Nation with respect to the protection of federally created rights," *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Its purpose was to provide "some further safeguards

to life, liberty, and property," Globe 374 (Rep. Lowe), by allowing individuals to seek damages or injunctive relief in the federal courts for deprivations of rights "secured by the Constitution of the United States," 17 Stat. 13. Critically, the statute is not "a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, [and] malicious prosecution." *Rehberg v. Paulk*, 566 U.S. 356, 366 (2012). Instead, it furnished "a uniquely federal remedy" for incursions on "rights secured by *the Constitution*." *Wilson v. Garcia*, 471 U.S. 261, 271-72 (1985) (quoting *Mitchum*, 407 U.S. at 239) (emphasis added).

Congress placed no limits on the constitutional rights that could be vindicated under Section 1983, nor did it suggest that the scope of those rights should be narrowed to match the causes of action that state tort law already recognized. This breadth is precisely what the bill's opponents emphasized, *see Monroe v. Pape*, 365 U.S. 167, 178 (1961), with legislators complaining that its remedial terms were "as comprehensive as can be used," Globe App. 217 (Sen. Thurman). Then, as now, objections were raised that Section 1983's broad remedy would "give rise to numerous vexations and outrageous prosecutions," *id.* App. 50 (Rep. Kerr), exposing state officers to frivolous lawsuits:

> [I]f the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, . . . pure in duty as a saint, . . . they are liable, and most certain, at the suit of any knave, plain or colored, under the pretext of the deprivation of his rights, privileges, and immunities as a citizen, *par excellence*, of the United States, to be summarily stripped of official

> authority, dragged to the bar of a distant and unfriendly court, and there placed in the pillory of vexatious, expensive, and protracted litigation . . . .

Globe 365 (Rep. Arthur); *id.* at 385 (Rep. Hawley) ("this bill . . . . puts in jeopardy the officers of the States, though in the conscientious discharge of their duties"). Those objections failed in the political process nearly a century and a half ago, and this Court should not revive them now by adding requirements to Section 1983 that are absent from its text and inconsistent with its remedial purpose.

Petitioners attempt to shore up their policy-based argument by offering an ostensibly neutral basis for it. They say that to identify the elements a plaintiff must prove in a First Amendment retaliatory arrest case, courts should impose the elements that were required by two "analogous" torts from state common law—false imprisonment and malicious prosecution. Because those two torts, according to Petitioners, required plaintiffs to plead and prove an absence of probable cause for their detention or prosecution, a Section 1983 plaintiff alleging retaliatory arrest must do the same.

Contrary to Petitioners' premise, however, these two torts were not analogous to a claim of First Amendment retaliation. As explained below, they protected fundamentally different interests and served entirely different aims than the First Amendment. And so the specific requirements of those torts, which were calibrated to balance a distinct set of concerns under state law, have no place in applying a federal statute meant to create an independent remedy for violations of the U.S. Constitution. Artificially limiting the scope of that federal constitutional remedy—in order to fit it within the confines of these

dissimilar state torts—would undermine Congress's statutory plan and the promise of Section 1983.

ARGUMENT

I. Section 1983 Was Meant To Vindicate the Unique and Fundamental Rights Guaranteed by the Federal Constitution, Not the Interests Protected by State Tort Law.

Section 1983, which derives from the first section of the Civil Rights Act of 1871, was enacted to create "a private right of action to vindicate violations of rights, privileges, or immunities secured by the Constitution." *Rehberg*, 566 U.S. at 361 (quotation marks omitted). The title of the 1871 legislation made its purpose clear: "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." 17 Stat. 13. This Act, "along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction Era," *Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982), which established "the role of the Federal Government as a guarantor of basic federal rights against state power," *Mitchum*, 407 U.S. at 239; *see* Globe 577 (Sen. Carpenter) ("one of the fundamental . . . revolutions effected in our Government" by the Fourteenth Amendment was to "give Congress affirmative power . . . to save the citizen from the violation of any of his rights by State Legislatures").

The text of what is now Section 1983 left no doubt about the new primacy of "federally secured rights," *Smith v. Wade*, 461 U.S. 30, 34 (1983), over state laws and practices that denied or frustrated those rights. The statute gave any person who was

deprived of "any rights, privileges, or immunities secured by the Constitution of the United States" the ability to hold the perpetrator liable, "*any . . . law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding.*" 17 Stat. 13 (emphasis added); *see* Globe 692 (Sen. Edmunds) (declaring it the "solemn duty of Congress . . . to secure to the individual, in spite of the State, or with its aid, as the case might be, precisely the rights that the Constitution gave him").

"The specific historical catalyst" for the passage of this legislation "was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights." *Wilson*, 471 U.S. at 276. In the debates over the Act, supporters "repeatedly described the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern states," which was made possible "because Klan members and sympathizers controlled or influenced the administration of state criminal justice." *Briscoe v. LaHue*, 460 U.S. 325, 337 (1983); *see* Globe 158 (Sen. Sherman) ("against these roaming bands of Ku Klux the law in North Carolina is a dead letter").

Significantly, these were not "cases of ordinary crime" but rather "political offenses." Globe 158 (Sen. Sherman). The Klan, in other words, was not a criminal organization but a terrorist organization, with "a political purpose" that it "sought to carry out . . . by murders, whippings, intimidation, and violence against its opponents." *Id.* at 320 (Rep. Stoughton). "Their object was the overthrow of the reconstruction policy of Congress and the disenfranchisement of the negro." *Id.* (quoting committee testimony of former Klan member).

In particular, the Klan—sheltered from punishment by the state—strove to suppress the speech and associational rights of the former slaves and their white allies, retaliating against those who dared defy them. *See* Globe 155 (Sen. Sherman) (quoting testimony describing attack in which the Klan "made all the colored men promise they would never vote the Radical ticket again"); *id.* at 157 (Sen. Sherman) ("[t]he negroes I allude to were killed because they were summoned as witnesses in the Federal courts"); *id.* at 321 (Rep. Stoughton) (quoting testimony of Klan victim: "They wanted to run them off because the principal part of them voted the Radical ticket. . . . They have been trying to get us to vote the Conservative ticket."); *id.* (Rep. Stoughton) (following a "meeting of the citizens . . . to protest against the outrages," "warrants were issued [at the Klan's instigation] for the arrest of peaceable and well-disposed negroes upon the charge of 'using seditious language'"); *id.* at 332 (Rep. Hoar) ("these citizens so murdered, outranged, or outlawed suffer all this because of their attachment to their country, their loyalty to its flag, or because their opinions on questions of public interest coincide with those of a majority of the American people").

Although Klan violence was "the principal catalyst for the legislation," Section 1983 "'was not a remedy against the Klan or its members but against those who representing a State in some capacity were unable or unwilling to enforce a state law.'" *District of Columbia v. Carter*, 409 U.S. 418, 426 (1973) (quoting *Monroe*, 365 U.S. at 175-76 (brackets omitted)). Congress recognized that laws were being applied selectively across the South to punish disfavored groups (the former slaves) and disfavored viewpoints (those of their white allies). While "outrages committed up-

on loyal people through the agency of this Ku Klux organization" went unpunished, as Senator Pratt noted, "[v]igorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid." Globe 505; *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 167 (1970) (noting "the persistent and widespread discriminatory practices of state officials").

The fundamental problem, therefore, was not isolated acts of violence—the type of discrete, individual harms for which state tort law was designed to provide compensation. Rather, it was that the Southern states' selective and discriminatory tolerance of this violence was "denying decent citizens *their civil and political rights*." *Wilson*, 471 U.S. at 276 (emphasis added); Globe 375 (Rep. Lowe) (Southern states were "permit[ing] the rights of citizens to be systematically trampled upon"). And that denial merited a remedy. *Id.* at 333 (Rep. Hoar) ("Suppose that . . . every person who dared to lift his voice in opposition to the sentiment of this conspiracy found his life and his property insecure. . . . In that case I claim that the power of Congress to intervene is complete and ample.").

To address this problem, Section 1983 "interpose[d] the federal courts between the States and the people, as guardians of the people's federal rights." *Patsy*, 457 U.S. at 503 (quoting *Mitchum*, 407 U.S. at 242). Previously "Congress relied on the state courts to vindicate essential rights arising under the Constitution." *Carter*, 409 U.S. at 427-28 (quoting *Zwickler v. Koota*, 389 U.S. 241, 245 (1967)). But "[w]ith the growing awareness that this reliance had been misplaced," lawmakers enacted Section 1983 to provide "indirect federal control over the unconstitutional ac-

tions of state officials." *Id.* at 428. Thus, while the violence inflicted on freedmen and their sympathizers "often resembled the torts of assault, battery, false imprisonment, and misrepresentation, § 1983 was not directed at the perpetrators of these deeds as much as at the state officials who tolerated and condoned them." *Owens v. Okure*, 488 U.S. 235, 249 n.11 (1989).

Section 1983 broke new ground, first, by making available a federal forum, based on the belief that federal courts would be able to "act with more independence" and "rise above prejudices or bad passions or terror." Globe 460 (Rep. Coburn).

Second, and most critical here, "Section 1983 impose[d] liability for violations of rights protected by *the Constitution*, not for violations of duties of care arising out of tort law." *Baker v. McCollan*, 443 U.S. 137, 146 (1979) (emphasis added); *see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 686 n.45 (1978) (Representative Bingham, the Fourteenth Amendment's principal architect, "declared the bill's purpose to be 'the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic.'" (quoting Globe App. 81)). "The coverage of the statute is thus broader than the pre-existing common law of torts." *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997). It "was designed to expose state and local officials to *a new form of liability*," *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981) (emphasis added), by providing a remedy for "federally secured rights," *Smith*, 461 U.S. at 34, and would be "supplementary to any remedy any State might have," *McNeese v. Bd. of Educ.*, 373 U.S. 668, 672 (1963). Regardless of what recourse might be available under state tort law for an injury, "[p]roponents of the measure repeatedly argued that . . . an independent federal remedy was

necessary." *Briscoe*, 460 U.S. at 338; *see* Globe 370 (Rep. Monroe) ("occasions arise in which life, liberty, and property require *new guarantees* for their security" (emphasis added)).

In sum, Section 1983 provides "*a uniquely federal remedy* against incursions under the claimed authority of state law upon *rights secured by the Constitution*." *Wilson*, 471 U.S. at 271-72 (quoting *Mitchum*, 407 U.S. at 239) (emphasis added). With full awareness that it was "altering the relationship between the States and the Nation with respect to the protection of federally created rights," Congress enacted Section 1983 to "protect *those* rights." *Mitchum*, 407 U.S. at 242 (emphasis added).

II. State Tort Rules May Be Borrowed To Fill in the Gaps of Section 1983 Only When Those Rules Are Compatible with the Statute's Purpose.

A. As with any statute, when interpreting Section 1983, "the starting point in [the] analysis must be the language of the statute itself." *Owen v. City of Independence*, 445 U.S. 622, 635 (1980). The statute's text clearly identifies the interests it protects, which include the "rights, privileges, or immunities secured by the Constitution," and the general types of remedies it provides, which include an "action at law." 42 U.S.C. § 1983. But the text lacks many details concerning how the constitutional tort remedy it authorizes should operate. So when a plaintiff alleges the violation of a constitutional right under Section 1983, courts "must determine the elements of, and rules associated with, an action seeking damages for its violation." *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017). That task, however, is "one essentially of statutory construction," *Wood v. Strickland*, 420 U.S. 308, 316 (1975), not an opportunity for a "freewheel-

ing policy choice," *Rehberg*, 566 U.S. at 363 (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)).

As this Court has recognized, "Congress intended the statute to be construed in the light of common-law principles that were well settled at the time of its enactment." *Kalina*, 522 U.S. at 123. That conclusion is premised on the "important assumption . . . that members of the 42d Congress were familiar with common-law principles . . . and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *City of Newport*, 453 U.S. at 258. Because Congress "borrowed general tort principles" in crafting Section 1983, *Heck v. Humphrey*, 512 U.S. 477, 485 n.4 (1994), this Court has often filled in the gaps of the statute with "federal rules conforming in general to common-law principles," *Wallace v. Kato*, 549 U.S. 384, 388 (2007); *see, e.g.*, *Monroe*, 365 U.S. at 187 (the statute "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions").

Crucially, however, "the Court has not suggested that § 1983 is simply a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, malicious prosecution, and more." *Rehberg*, 566 U.S. at 366. Instead, it has recognized that "[t]he new federal claim created by § 1983 differs in important ways from those pre-existing torts," most significantly in that "it reaches constitutional and statutory violations that do not correspond to any previously known tort." *Id.* Because of that, "any analogies to those causes of action are bound to be imperfect." *Owens*, 488 U.S. at 248-49; *see Wilson*, 471 U.S. at 272 (the statute has "no precise counterpart in state law"); *Monroe*, 365 U.S.

at 196 (Harlan, J., concurring) ("a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right").

Accordingly, while this Court "look[s] first to the common law of torts" when "defining the contours and prerequisites of a § 1983 claim," tort principles "are meant to guide rather than to control the definition of § 1983 claims, serving 'more as a source of inspired examples than of prefabricated components.'" *Manuel*, 137 S. Ct. at 920-21 (quoting *Hartman v. Moore*, 547 U.S. 250, 258 (2006)). Thus the elements of a state cause of action are not to be mechanically imposed on a Section 1983 claim through "narrow analogies." *Owens*, 488 U.S. at 248. Instead, when "applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue." *Manuel*, 137 S. Ct. at 921.[2]

Rather than rely inflexibly on analogies to specific state torts, therefore, this Court's approach has

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[2] *See, e.g.*, *Malley*, 475 U.S. at 340 ("[W]hile we look to the common law for guidance, we do not assume that Congress intended to incorporate every common-law immunity into § 1983 in unaltered form."); *Anderson v. Creighton*, 483 U.S. 635, 644-45 (1987) ("our determinations as to the scope of official immunity are made in the light of the common-law tradition," but "we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law" (quotation marks omitted)); *Rehberg*, 566 U.S. at 364 (although "tied to" the common law, the "Court's precedents have not mechanically duplicated the precise scope of the absolute immunity that the common law provided").

traditionally been to call upon more basic, fundamental, and broadly applicable principles of tort law. *See, e.g., Tenney v. Brandhove*, 341 U.S. 367, 372-73 (1951) (legislator immunity "was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation . . . a reflection of political principles already firmly established in the States"); *Briscoe*, 460 U.S. at 334 ("the common law's protection for witnesses is a tradition so well grounded in history and reason that we cannot believe that Congress impinged on it by covert inclusion in the general language before us" (citation and quotation marks omitted)); *Carey v. Piphus*, 435 U.S. 247, 254-55 (1978) (relying on "[t]he cardinal principle of damages in Anglo-American law," which "hardly could have been foreign to the many lawyers in Congress in 1871" (quotation marks omitted)); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967) ("The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine."). Reliance on such general, foundational principles makes sense because they are the ones that "members of the 42d Congress were familiar with" and "likely intended" to apply under Section 1983. *City of Newport*, 453 U.S. at 258.

That is critical because "[r]ights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect." *Carey*, 435 U.S. at 254. The federal Constitution protects interests distinct from those recognized by state tort law, *Daniels v. Williams*, 474 U.S. 327, 333 (1986) ("the United States Constitution" and "traditional tort law . . . do not address the same concerns"), even when these two

sources of law prohibit conduct that is superficially similar.

B. To be sure, sometimes "the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right. In such cases, it may be appropriate to apply the tort rules . . . directly to the § 1983 action." *Carey*, 435 U.S. at 258. "In other cases," however, "the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law torts." *Id.*; *see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394 (1971) ("The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile."); *Manuel*, 137 S. Ct. at 925 (Alito, J., dissenting) (citing "a severe mismatch" between the Fourth Amendment and the elements of a claim for malicious prosecution).

Where constitutional requirements and the interests they protect do not neatly align with any particular common law tort, "[t]he purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action." *Carey*, 435 U.S. at 258; *see McNeese*, 373 U.S. at 674 (where "petitioners assert that respondents . . . are depriving them of rights protected by the Fourteenth Amendment," it "is immaterial whether respondents' conduct is legal or illegal as a matter of state law"). In a Section 1983 suit, the question is not whether the defendant has breached a duty of care imposed by state law, but rather whether he or she "has conformed to the re-

quirements of the Federal Constitution." *Owen*, 445 U.S. at 649.

"In order to further the purpose of § 1983," therefore, "the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question—just as the common-law rules of damages themselves were defined by the interests protected in the various branches of tort law." *Carey*, 435 U.S. at 258-59; *see Manuel*, 137 S. Ct. at 921. Because state courts do not develop the rules of their common law "with national interests in mind," the federal courts must ensure that any reliance on state law "will not frustrate or interfere with the implementation of national policies." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977). This Court's "consideration of state common law rules is only a device to facilitate determination of Congressional intent," *Smith*, 461 U.S. at 67 (Rehnquist, J., dissenting), and "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action," *Wilson*, 471 U.S. at 269.

C. Further, even when this Court identifies a common law principle that may be appropriate to import into Section 1983, the Court does not embrace that rule without first considering whether it is consistent with the history and purpose of Section 1983.

With respect to damages, for instance, the Court has explained that, in the absence of "specific guidance" from Section 1983's text and history, it "look[s] first to the common law of torts," but only "with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute." *Smith*, 461 U.S. at 34.

Likewise, with respect to immunities, even when this Court determines that "an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." *Malley*, 475 U.S. at 340 (quoting *Tower v. Glover*, 467 U.S. 914, 920 (1984)). That is because "it would defeat the promise of the statute to recognize any preexisting immunity without determining . . . its compatibility with the purposes of § 1983." *City of Newport*, 453 U.S. at 259; *see Wyatt v. Cole*, 504 U.S. 158, 164 (1992) ("irrespective of the common law support, we will not recognize an immunity available at common law if § 1983's history or purpose counsel against applying it in § 1983 actions").

Similarly, in deciding which kind of state statutes of limitations to apply, this Court has rejected yoking Section 1983 actions to the "multiplicity of state intentional tort statutes of limitations." *Owens*, 488 U.S. at 245 (1989). "Given that so many claims brought under § 1983 have no precise state-law analog, applying the statute of limitations for the limited category of intentional torts would be inconsistent with § 1983's broad scope." *Id.* at 249; *see id.* ("The intentional tort analogy is particularly inapposite in light of the wide spectrum of claims which § 1983 has come to span.").

D. On rare occasions, this Court has employed a variant on the approach described above. This alternative method begins by identifying a specific tort available in 1871 that represents the "closest analogy" to whatever constitutional claim is being considered. *Heck*, 512 U.S. at 484. The Court has then imposed the elements and associated rules of that spe-

cific tort on the constitutional claim. *See Manuel*, 137 S. Ct. at 920 ("Sometimes, that review of common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort." (citing *Wallace*, 549 U.S. at 388-90; *Heck*, 512 U.S. at 483-87)).

This approach was first used in *Heck v. Humphrey*. There, the Court reasoned that "[t]he common-law cause of action for malicious prosecution provide[d] the closest analogy" to the plaintiff's claims, and concluded that "[o]ne element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused." *Heck*, 512 U.S. at 484. The Court therefore imposed the same element on a Section 1983 plaintiff challenging his state confinement. *Id.* at 486-87.

This approach risks limiting the breadth of Section 1983's constitutional remedy to the scope of the common law torts that states recognized in 1871. Despite that risk, this approach can effectuate congressional intent—when the constitutional right at issue truly is analogous to an interest that was protected by state tort law. In *Wallace v. Kato*, for instance, where a plaintiff sought damages under Section 1983 for an unlawful arrest, the question arose when the plaintiff's cause of action accrued. This Court identified the tort of false imprisonment as "the proper analogy" to the plaintiff's cause of action, because "[t]he sort of unlawful detention remediable by the tort of false imprisonment is detention *without legal process*, . . . and the allegations before us arise from respondents' detention of petitioner *without legal process*." 549 U.S. at 389. The Court therefore applied the "distinctive" accrual rules of that tort to the plaintiff's claim. *Id.* Because those rules reflected

"the reality that the victim may not be able to sue while he is still imprisoned," *id.*, they were capable of vindicating the federal constitutional right at issue, notwithstanding their origin in state tort law.

But when a constitutional claim has no true analogue in the torts that were available in 1871—as here, *see infra*, Part III—restricting the breadth of that constitutional claim by forcing it within the confines of a dissimilar state tort would diminish the statute's promise of "a uniquely federal remedy" for "rights secured by the Constitution," *Wilson*, 471 U.S. at 271-72 (quoting *Mitchum*, 407 U.S. at 239). That is, if this Court were to insist on selecting a "most analogous" state tort for every type of constitutional claim—and mechanically transplanting the elements of that tort, regardless of differences between the two—the Court would undermine the purpose of Section 1983, which was meant to provide a unique federal right, "some *further safeguards* to life, liberty, and property." Globe 374 (Rep. Lowe) (emphasis added); *see McNeese*, 373 U.S. at 672 (Section 1983 was enacted to offer a federal remedy "supplementary to any remedy any State might have").

There is no valid basis for such a restrictive approach, especially because the Forty-Second Congress understood that Section 1983 would be interpreted broadly to promote its remedial goals. "Representative Shellabarger, the author and manager of the bill in the House, explained in his introductory remarks the breadth of construction that the act was to receive." *Owen*, 445 U.S. at 636. He noted: "This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. . . . As has been again and again decided by your own Supreme Court

of the United States, . . . the largest latitude consistent with the words employed is uniformly given in construing such statutes . . . ." Globe App. 68. "Similar views of the Act's broad remedy for violations of federally protected rights were voiced by its supporters in both Houses of Congress." *Owen*, 445 U.S. at 636; *cf. Wilson*, 471 U.S. at 272 (adopting interpretation of Section 1983 that "best fits the statute's remedial purpose").

Rigidly adhering to the "analogy" approach, even when the analogy does not fit, loses sight of the interpretive goal this approach is supposed to serve—effectuating congressional intent. Recognizing that pitfall, this Court has repeatedly avoided "drawing narrow analogies between § 1983 claims and state causes of action," *Owens*, 488 U.S. at 248, and it should maintain that course here.

III. Because the Torts of False Imprisonment and Malicious Prosecution Are Not Analogous to a Claim of First Amendment Speech Retaliation, It Would Undermine Section 1983 To Impose the Rules of Those Torts Here.

As explained above, when a plaintiff brings a Section 1983 action for a constitutional violation, and this Court "determine[s] the elements of . . . an action seeking damages for [that] violation," *Manuel*, 137 S. Ct. at 920, the "precise contours" of those elements are not to be "slavishly derived from the often arcane rules of the common law," *Anderson*, 483 U.S. at 645. Instead, they "should be tailored to the interests protected by the particular right in question." *Carey*, 435 U.S. at 259.

In this case, the right in question is the freedom to speak without being arrested by law enforcement

in retaliation for that speech. And the interests that this right protects are fundamentally unlike the interests protected by superficially similar state torts in 1871. Because of that fundamental disparity, the elements of those torts—such as the requirement of an absence of probable cause—should not be imposed on a First Amendment claim of retaliatory arrest.

False Imprisonment. False imprisonment was defined in 1871 as "the unlawful restraint of a person contrary to his will, either with or without process of law." 1 Francis Hilliard, *The Law of Torts or Private Wrongs* § 1a, at 195 (1866) (emphasis omitted). When process of law was employed, the tort was sometimes called false arrest. *See Wallace*, 549 U.S. at 388.

At first glance, false imprisonment may seem similar to First Amendment retaliatory arrest because both involve an allegedly wrongful detention. But there the resemblance ends. The nineteenth-century tort of false imprisonment served different goals, and protected different interests, than the freedom from speech-based arrests.

The essence of false imprisonment was the *absence of legal grounds* for the detention or arrest: "False imprisonment is a trespass committed by one man against the person of another, by *unlawfully* arresting him, and detaining him *without any legal authority*." 2 C.G. Addison, *A Treatise on the Law of Torts* § 798, at 13 (H.G. Wood ed., 1881) (emphasis added); *see Burns v. Erben*, 40 N.Y. 463, 466 (1869) (false imprisonment is "an *illegal* arrest and detention," and "[t]he gist of such an action is an *unlawful* detention" (emphasis added)). Indeed, the tort was sometimes even referred to as "[u]nlawful or false imprisonment." Martin L. Newell, *A Treatise on the Law of Malicious Prosecution, False Imprisonment, and the Abuse of Legal Process* § 1, at 56 (1892); *id.*

(defining the tort as "confinement or detention *without sufficient authority*" (emphasis added)).

Because an *absence of legal authority* was at the core of false imprisonment—baked into its very definition—it is clear why the existence of probable cause would defeat such a claim. An arrest could lawfully be carried out if there were reasonable and sufficient grounds for it. *Chrisman v. Carney*, 33 Ark. 316, 321 (1878); *Rohan v. Sawin*, 59 Mass. 281, 285 (1850). Therefore the existence of such reasonable and sufficient grounds meant the arrest was not unlawful. *Id.*

That principle, virtually a tautology, illustrates the fundamental mismatch between the common law claim of false imprisonment and a First Amendment claim of speech retaliation. The latter does not depend on showing that a defendant lacked legal authority to take the action he or she took. To the contrary, it is generally a given in such cases that the challenged decision was otherwise within the defendant's lawful authority. *See, e.g., Bd. of Cty. Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 674 (1996) ("the government is entitled to terminate [an employee] for no reason at all," but may not do so "'on a basis that infringes his constitutionally protected . . . freedom of speech'" (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972))). The gravamen of the First Amendment claim, rather, is that retaliation was the deciding factor in the defendant's choice. *Id.* at 675 ("The First Amendment's guarantee of freedom of speech protects government employees from termination *because of* their speech on matters of public concern."); *see Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1949 (2018). The essence of the wrong, in other words, is the government's impermissible reprisal for speech, which "offends the Constitution [because] it threatens to inhibit exercise of the protected right."

Hartman, 547 U.S. at 256 (quoting *Crawford–El v. Britton*, 523 U.S. 574, 588 n.10 (1998)).

By contrast, false imprisonment had nothing to do with the motives or intent of the defendant. That is why, courts explained, "if the arrest was unlawful, no malice need be shown. The defendant, if he participated in it, or instigated or encouraged it, is liable for the false imprisonment, however pure his motives may have been." *Chrisman*, 33 Ark. at 321. But in a claim of First Amendment retaliation, motive is the very crux of the matter. *Hartman*, 547 U.S. at 259 (plaintiffs "must show a causal connection between a defendant's retaliatory animus and subsequent injury").

Further widening the gulf, the tort of false imprisonment was not designed specifically to address misconduct *by the government*. Private persons, no less than government officers, could be held liable for false imprisonment. *See* Hilliard, *supra*, § 16, at 206-07 ("The most numerous cases of false imprisonment, are those involving the right of peace-officers *or private individuals* to arrest without warrant . . . ." (emphasis added)).[3] As this fact underscores, the tort was not aimed at deterring or redressing *government* misconduct. Indeed, government officers were "treated with *more* indulgence" under the rules of false imprisonment than private persons were. Thomas M.

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[3] Such actions against private persons were common, because the law gave private persons broad authority to arrest suspected felons. *See Brockway v. Crawford*, 48 N.C. 433, 437 (1856) ("the law encourages every one, as well private citizens as officers, to keep a sharp look-out for the apprehension of felons, by holding them exempt from responsibility for an arrest, . . . unless the arrest is made . . . without probable cause"); *Burns*, 40 N.Y. at 466 ("any man, upon reasonable probable ground of suspicion, may justify apprehending a suspected person").

Cooley, *A Treatise on the Law of Torts* 175 (1879) (emphasis added); *see Rohan*, 59 Mass. at 285 ("as to constables, and other peace-officers, acting officially, the law clothes them with greater authority").

Likewise, the tort of false imprisonment was obviously not designed to safeguard the interests of free speech in any way. Its aim was simply to compensate individuals for "causeless arrests," Cooley, *supra*, at 175, that had impinged on their liberty of movement. The tort's rules and prerequisites were fashioned to balance *that* interest—regarded as a strictly personal one—with the countervailing societal need to encourage the arrest of felons and promote law and order: "the problem always is, how to harmonize the *individual right to liberty* with the *public right to protection*." *Id.* (emphasis added).

In stark contrast, the First Amendment is specifically and exclusively focused on *governmental suppression of speech* and the unique harms that it entails—not only for the individual targeted but for others holding similar views and for the nation at large. "The First Amendment presupposes that the freedom to speak one's mind is *not only an aspect of individual liberty*—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 503-04 (1984) (emphasis added).

Moreover, while false imprisonment rules were designed solely to compensate individual victims of unlawful detentions for their injuries, Section 1983 has a broader purpose: its constitutional remedy is "intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations." *Owen*, 445 U.S. at 651; *see Smith*, 461 U.S. at 49 ("deter-

rence of future egregious conduct is a primary purpose" of Section 1983); *City of Newport*, 453 U.S. at 268 (the goals are "compensation *and* deterrence" (emphasis added)).

Indeed, for the Forty-Second Congress, compensating individual victims for their injuries was primarily a means to an end: preventing state governments from depriving individuals of their federally guaranteed constitutional rights. The text Congress enacted reveals the centrality of its deterrent and preventive function, by making available *injunctive* relief, "or other proper proceeding for redress," in addition to damages. 17 Stat. 13. The bill's proponents also made this point clear. *See* Globe 501 (Sen. Frelinghuysen) ("How is the United States to protect the privileges of citizens of the United States in the States? It cannot deal with the States or with their officials to compel proper legislation and its enforcement; it can only deal with the offenders who violate the privileges and immunities of citizens of the United States. . . . as you cannot reach the Legislatures, the injured party should have an original action in our Federal courts . . . ."); *id.* at 376 (Rep. Lowe) ("The Federal Government cannot serve a writ of *mandamus* upon State Executives or upon State courts to compel them to observe and protect the rights, privileges, and immunities of citizens. There is no legal machinery for that purpose. . . . Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired."). A comparable emphasis on deterrence is absent from the common law rules of false imprisonment.

None of these discrepancies should be surprising: "It would indeed be the purest coincidence if the state remedies for violations of common-law rights by pri-

vate citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection." *Monroe*, 365 U.S. at 196 n.5 (Harlan, J., concurring). Quite simply, false imprisonment is an inappropriate analogy for Section 1983 retaliatory arrest claims.

Even if one ignored all this and insisted on analogizing First Amendment retaliatory arrest to false imprisonment, the rules governing false imprisonment still would not justify the probable cause rule that Petitioners seek in this case. For it was crystal clear in 1871 that false imprisonment claims were defeated only where there was probable cause to believe a *felony* had occurred. *Chrisman*, 33 Ark. at 321; *Burns*, 40 N.Y. at 466; *Brockway*, 48 N.C. at 437; *Rohan*, 59 Mass. at 285; Addison, *supra*, § 802, at 15; Cooley, *supra*, at 175; Newell, *supra*, § 1, at 56. "A constable ha[d] no power at common law to arrest a person without warrant on suspicion of his having committed a misdemeanor." Addison, *supra*, § 802, at 15; *see* Hilliard, *supra*, § 17, at 207 ("somewhat nice distinctions have been established upon this subject, depending on the nature and degree of the crime").

To be sure, the boundary between felonies and misdemeanors may not be the same today as it was in 1871, but it is doubtful that the crime of "harassment," *see* Alaska Stat. 11.61.120(a)(1), would have been understood by the members of the Forty-Second Congress as the type of offense for which a warrantless arrest could be conducted on probable cause without fear of liability. *See, e.g.*, *Rohan*, 59 Mass. at 286 ("Larceny of goods"); Cooley, *supra*, at 174

("setting fire to [a] neighbor's house"); Hilliard, *supra*, § 19, at 210 ("furious driving").[4]

Moreover, as Petitioners and the United States acknowledge, it was not even universally established among the states that probable cause of a felony always defeated an action for false imprisonment. *See, e.g., Hawley v. Butler*, 54 Barb. 490, 503 (N.Y. Sup. 1868) (stating that only "the officer *acting without malice or bad motive*, will be protected" (emphasis added)). As discussed above, borrowing a specific tort rule to flesh out Section 1983 is justifiable only when that rule was so pervasive and "well grounded in history" that members of Congress cannot be assumed to have departed from it through silence. *Briscoe*, 460 U.S. at 334 (quoting *Tenney*, 341 U.S. at 376).

Significantly, therefore, even though the common law rules of false imprisonment did not safeguard speech rights, address the motives of government officers, or seek to deter violations of fundamental constitutional rights—all of which are reasons why this tort is an inapt analogy for First Amendment retalia-

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[4] It was also generally acknowledged that "[f]orcible breaches of the peace, in affrays, riots, etc." justified warrantless arrests without fear of liability, based on "their tendency to lead to serious, and perhaps fatal, injuries." Cooley, *supra*, at 175-76. Here too, it appears that the types of conduct encompassed within this rule were more serious than what Alaska's "harassment" misdemeanor covers. *See* Addison, *supra*, § 811, at 23 ("It is not enough to show that the plaintiff made a great noise and disturbance, and refused to depart, and was in great heat and fury . . . . Disturbance and annoyance of a public meeting, by putting questions to the speaker, making observations on their statements, and saying, 'That's a lie,' do not constitute a breach of the peace." (quotation marks omitted)). And if "breach of the peace" in some jurisdictions covered activity protected today by the First Amendment, that would only highlight the disparity between that Amendment and the rules of the common law.

tion—those rules *still* do not support the immunity from liability that Petitioners seek.

Malicious Prosecution. The tort of malicious prosecution fares no better as an analogy to First Amendment retaliatory arrest.

Malicious prosecution involved instigating legal process to have another person arrested or detained, such as by initiating a criminal prosecution. *Ahern v. Collins*, 39 Mo. 145, 150 (1866) ("The essential ground of an action for malicious prosecution . . . consisted in the fact that there had been a legal prosecution against the plaintiff without reasonable or probable cause."); *Chrisman*, 33 Ark. at 321 ("To have procured the warrant from malice and without probable cause is a distinct civil injury.").

In an action for malicious prosecution, therefore, the defendant was not accused of having personally apprehended or detained the plaintiff, but rather of having caused such acts by those with legal authority to carry them out. *See Cardival v. Smith*, 109 Mass. 158, 158 (1872) (malicious prosecution "is an action for bringing a suit at law"). And the wrongdoer in a malicious prosecution case—the person who allegedly acted with ill intent—was often not a government official. Under traditional common law rules, private persons could initiate criminal prosecutions, *see, e.g.*, *Ventress v. Rosser*, 73 Ga. 534 (1884) (defendant charged plaintiff with larceny and caused his arrest and prosecution); *Herman v. Brookerhoff*, 8 Watts 240 (Pa. 1839) (defendant caused a writ of detention to be issued against plaintiff for selling merchandise without a license), and they could even have someone detained as part of a *civil* lawsuit, such as "for an alleged fraud in contracting a debt," *Hogg v. Pinckney*, 16 S.C. 387, 392 (1882), or an "alleged infringement of a patent right," Hilliard, *supra*, § 22, at 219. If

they did so maliciously and without probable cause, they were liable for malicious prosecution. *Dinsman v. Wilkes*, 53 U.S. 390, 402 (1851) ("The action has been extended to civil as well as criminal cases where legal process has been maliciously used against another without probable cause."); *Cardival*, 109 Mass. at 158 ("if one maliciously causes another to be arrested and held to bail for a sum not due . . . . an action for a malicious prosecution may be maintained against him").[5]

In short, the tort of malicious prosecution had no special focus on wrongdoing by government officers. *See, e.g., Stoecker v. Nathanson*, 98 N.W. 1061, 1061-62 (Neb. 1904) (defendant had plaintiff prosecuted over unpaid bill); *Wheeler v. Nesbitt*, 65 U.S. 544, 548 (1860) (defendants included both a magistrate and private persons).

That is highly significant because, as discussed above, the harm that First Amendment retaliation claims seek to deter is the harm of allowing the *government* to make reprisals for one's speech, which would allow it to "produce a result which (it) could not command directly." *Perry*, 408 U.S. at 597 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). The rules of malicious prosecution were not shaped to address this concern, but on the contrary to encourage prosecutions, *see Chesley v. King*, 74 Me. 164, 175-76 (1882); *Ventress*, 73 Ga. at 541, by ensuring that "*whatever may be the motive* of the prosecutor in a criminal action, *he is free from danger* if there be a probable cause for the accusation which he makes," *Hogg*, 16 S.C. at 393 (emphasis added). That goal is

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[5] In cases involving civil process, the tort was sometimes termed "malicious arrest" and involved slightly different rules. *See Ahern*, 39 Mo. at 150; *Herman*, 8 Watts at 241.

incompatible with the aim of deterring police officers from selectively employing their lawful authority to punish those whose speech they dislike.

Indeed, notwithstanding its name, this tort's rules and elements were not focused on deterring malice. Instead, much like false imprisonment, this tort was designed to compensate individuals for the harms that resulted from being prosecuted without an adequate reason. "The essential ground of an action for malicious prosecution," therefore, "consisted in the fact that there had been a legal prosecution against the plaintiff *without reasonable or probable cause*." *Ahern*, 39 Mo. at 150 (emphasis added); *see Herman*, 8 Watts at 241 ("[t]he gist of the action . . . is the origination of a malicious *and groundless* prosecution, which *ipso facto* put the party in peril" (emphasis added)); *Chrisman*, 33 Ark. at 322-23 ("The law does not undertake to compel—however society may respect—a nice sense of honor, by inflicting a pecuniary liability upon a person for what he might lawfully and ought to do, because his motives were selfish.").

While malice was also a "necessary ingredient," many courts allowed it to "be inferred from the want of probable cause," *Ahern*, 39 Mo. at 150; *Turner v. O'Brien*, 5 Neb. 542, 543-44 (1877) ("if want of probable cause is established . . . , then malice may be, and most commonly is inferred"), illustrating its secondary status. *See Wheeler*, 65 U.S. at 551-52 (a plaintiff must "prove affirmatively . . . that the defendant had no reasonable ground for commencing the prosecution," but the jury may make an "inference of malice"). Some authorities went so far as to actually define "malicious" actions as those with no justifiable basis. *See Hogg*, 16 S.C. at 398 ("malice in law being a wrongful act done intentionally *without just cause*

or excuse" (emphasis added)); *Boyd v. Cross*, 35 Md. 194, 197 (1872) ("there ought to be enough to satisfy a reasonable man that the accuser had *no ground for proceeding* but his desire to injure the accused" (emphasis added)).

In sum, because of how this tort treated the concepts of malice and intent, its elements are incapable of handling the unique harms addressed by the First Amendment freedom from speech-based retaliation. The common law recognized that "a person actuated by the plainest malice may nevertheless . . . have a justifiable reason for the prosecution of the charge." *Wheeler*, 65 U.S. at 550. And as far as the common law was concerned, having "a justifiable reason" was enough to immunize defendants from liability for this tort. But if one is seeking to prevent the selective use of governmental power to suppress disfavored ideas, the existence of "a justifiable reason" for an officer's conduct is not enough.

This Court, therefore, should not artificially limit First Amendment claims of retaliatory arrest by imposing on them the elements of this state tort. Doing so would be a significant step toward erasing the concept of retaliation from the remedy that Section 1983 provides. And as a result, it would become less true that "the First Amendment prohibits government officials from retaliating against individuals for engaging in protected speech." *Lozman*, 138 S. Ct. at 1949. There is not the slightest indication in the text, history, or purpose of Section 1983 "that Congress would have sanctioned this interpretation of its statute." *Wilson*, 471 U.S. at 274-75.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
BRIAN R. FRAZELLE
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

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* Counsel of Record

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IN THE

Supreme Court of the United States

LUIS A. NIEVES, *et al.*,
Petitioners,

v.

RUSSELL P. BARTLETT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE DISTRICT OF COLUMBIA AND THE STATES OF COLORADO, IDAHO, INDIANA, KANSAS, LOUISIANA, MAINE, MISSISSIPPI, MONTANA, NEW MEXICO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, UTAH, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

KARL A. RACINE
Attorney General for the
District of Columbia

LOREN L. ALIKHAN
Solicitor General
Counsel of Record

CAROLINE S. VAN ZILE
Deputy Solicitor General

CARL J. SCHIFFERLE
Senior Assistant Attorney General

D.C. OFFICE OF THE
ATTORNEY GENERAL
441 4th Street, NW
Suite 630 South
Washington, D.C. 20001
(202) 727-6287
loren.alikhan@dc.gov

Counsel for Amicus Curiae
District of Columbia

(Additional Counsel Listed On Signature Page)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court held that probable cause defeats a First Amendment retaliatory-prosecution claim under 42 U.S.C. § 1983 as a matter of law. Does probable cause likewise defeat a First Amendment retaliatory-arrest claim under Section 1983?

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INTEREST OF *AMICI CURIAE*

The ability to enact, administer, and enforce criminal laws is at the heart of a State's sovereignty. Most crimes fall under state rather than federal jurisdiction, making law enforcement a primary function for state and local governments. In protecting the safety of their residents, States have a vital interest in ensuring that law enforcement officers can arrest based on probable cause. Where a State has authorized arrest for a crime, and that arrest is based on probable cause, arresting officers should not fear that they will be subject to liability for a First Amendment retaliatory-arrest claim. State law enforcement would be impaired if officers were deterred from making arrests by the prospect of defending their subjective motivations years later in a subsequent civil lawsuit.

The *Amici* States urge this Court to reverse the court of appeals' decision and, consistent with its decision in *Hartman v. Moore*, 547 U.S. 250 (2006), determine that the absence of probable cause is an element of a First Amendment retaliatory-arrest claim.

SUMMARY OF ARGUMENT

As petitioner explains, it follows from this Court's precedent and common-law analogues that 42 U.S.C. § 1983 requires a plaintiff to show a lack of probable cause to recover damages for an arrest allegedly in violation of the First Amendment. The *Amici* States write to highlight two additional points.

1. The Ninth Circuit's contrary rule creates immense practical difficulties for law enforcement. If a litigant need not prove the absence of probable cause, virtually every arrest would give rise to a potentially viable retaliatory-arrest lawsuit for damages. It would be

easy for any arrestee to claim that he engaged in protected speech contemporaneous with his arrest and thus that the arrest was in retaliation for the speech. Suspects routinely speak to police during encounters, make other reported or overheard statements, and display speech on their clothing, possessions, or vehicles. Unless the speech itself constitutes a crime, virtually all of it would be protected under the Ninth Circuit's rule.

It would similarly be easy for an arrestee to allege that the arrest was motivated, in part, by the officer's disagreement with that speech. Much of an arrestee's speech might be critical and outspoken. Suspects will naturally object to police inquiry, protest their innocence, or communicate their displeasure in other ways. This can turn hostile. On a daily basis, police are required to withstand insults and verbal abuse. Arrestees may also choose to break a law either as a chosen means of protest or to state their objections to the law itself, and may therefore argue that their unlawful conduct was "expressive." Additionally, a suspect's speech may be inculpatory. It may suggest the requisite state of mind, a motive, or other facts relevant to guilt. In all those situations, an arrestee could readily claim that the speech was a motivating factor in his arrest.

Because retaliation would be so easy to claim, a retaliatory-arrest standard that lacks the absence of probable cause as an element would discourage officers from enforcing the law. Without the protection of an objective, probable-cause test, arresting officers would fear a suit that likely could not be decided without burdensome discovery and a trial. They would also correctly foresee a real threat of liability inherent in a jury trying to reconstruct their subjective

motivations. Because police often must make arrest decisions quickly and under difficult and tense circumstances, the threat of such litigation would cause them to hesitate to arrest, even when supported by probable cause and the need to protect the public. Adopting the Ninth Circuit's rule would also make police encounters more dangerous by encouraging hostility toward officers as a tactic to avoid arrest.

It is unclear how, under the Ninth Circuit's rule, a court or jury could objectively evaluate whether an arrestee's speech or unlawful conduct caused her arrest. Some have suggested focusing liability on whether the officer, in his defense, can show that police generally arrest for the relevant offense. But an officer cannot realistically know, on the scene, whether an offense is one that is or is not commonly enforced. Any arrest, then, would be made under a cloud of potential liability, at the officer's own peril. Put simply, there is no practical method for making a determination about the "frequency" of arrests for a particular crime, even for purposes of the officer's defense at trial.

Moreover, a test focusing on what some hypothetical, average officer would have done in the same circumstance would impair the ability of police to address localized community problems. Factoring liability on whether police generally arrest for an offense would gradually pressure police, as suits are litigated, to categorize each offense as either one for which they always arrest or never arrest. Among other problems, this frustrates the application of community policing, which encourages police to act with greater discretion, continually using input from the community on what problems warrant police resources and what responses are effective.

2. The Ninth Circuit's rule is also unnecessary to protect First Amendment interests. States and localities can take effective remedial action in response to citizen complaints of police misbehavior, including alleged retaliation. Law enforcement agencies have an important duty, as well as a direct interest, in ensuring that citizen complaints against officers are thoroughly investigated and appropriate disciplinary action is taken. Such internal review is a vital component of managing a police department and maintaining the public trust upon which law enforcement depends. State and local governments can flexibly adopt solutions that promote law enforcement accountability and effectiveness.

Additionally, many forms of external review of citizen complaints have been implemented throughout the nation. In many cities, citizen review boards with subpoena powers directly investigate complaints of officer misconduct and make findings and recommendations. Other jurisdictions have independent oversight agencies that closely review a police department's handling of its own internal affairs investigations. Though the mechanisms may vary, each locality can select the administrative process that best addresses its own situation. State governments have their own oversight role, too, and can enact legislation and policies to ensure that citizen complaints are appropriately handled.

States may also afford additional protections against retaliatory arrest by limiting the arrest power and establishing alternatives to arrest. States generally prohibit warrantless arrests for misdemeanors unless the crime is committed in the officer's presence. States have also circumscribed the power to arrest by providing for release on citation or summons, in lieu of

a full custodial arrest, for certain crimes or under certain circumstances. The policies of local governments and police departments may establish additional standards and guidelines for citation in lieu of arrest, thus limiting the potential of retaliatory arrests for such crimes. First Amendment interests are important, but the Ninth Circuit's highly flawed and impractical rule is not the only option for protecting them.

ARGUMENT

I. The Ninth Circuit's Rule Inhibits Effective Policing By Discouraging Justified Arrests, Heightening The Peril Of Arrest Situations, And Limiting The Ability Of The Police To Respond To Community Problems.

As the Second, Fourth, Fifth, Eighth, and Eleventh Circuits have correctly recognized, the existence of probable cause defeats a claim for retaliatory arrest. *Mozzochi v. Borden*, 959 F.2d 1174, 1180 (2d Cir. 1992) (if "probable cause to arrest exist[s] independent of the defendants' motive," a retaliatory-arrest claim fails); *Pegg v. Herrnberger*, 845 F.3d 112, 119 (4th Cir. 2017), (where officer had probable cause to arrest plaintiff, "his arrest was not retaliatory"); *Keenan v. Tejeda*, 290 F.3d 252, 261-62 (5th Cir. 2002) (the "objectives of law enforcement take primacy over the citizen's right to avoid retaliation"); *McCabe v. Parker*, 608 F.3d 1068, 1075 (8th Cir. 2010) ("Lack of probable cause is a necessary element" of a First Amendment retaliatory-arrest claim); *Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002) ("the existence of probable cause to arrest" bars a First Amendment retaliation claim). That conclusion makes sense as a legal matter, *see* Pet. Br. 16-41, but it also furthers important public safety goals. If officers find probable cause to arrest under the totality of the circumstances, they should be

entitled to make that arrest—and thereby protect public safety—without fear that they will later be subject to a suit challenging their subjective motivations. The threat of such suits would not only make officers' already difficult and dangerous jobs even more harrowing, but would also hinder law enforcement agencies from taking custody of dangerous offenders and implementing effective community policing.

A. Under the Ninth Circuit's rule, nearly all arrestees could sue—and likely force a trial—by questioning the officers' subjective motivations.

1. *Retaliatory arrest could easily be claimed in most instances given the prevalence of suspects' protected speech.*

Under the Ninth Circuit's rule, an arrestee may subject his arresting officers to a burdensome lawsuit simply by alleging a retaliatory motive. Such claims will be easy to advance because an arrestee will almost always be able to identify protected speech contemporaneous with his arrest. There is a "vast realm" of protected speech, and content-based restrictions on protected speech are limited to just a few traditional categories (such as fraud, fighting words, and true threats). *United States v. Alvarez*, 567 U.S. 709, 717-18 (2012) (plurality op.); *see also Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790-91 (2011) (outlining the exceptions "in a few limited areas" to the rule that speech is generally protected). As a result, in virtually every case where an arrestee speaks *at all*, she will have engaged in protected speech.

Suspects rarely remain completely silent during a police encounter. Those who have broken the law are

not happy to be apprehended and often speak critically of police. Hoping to frustrate the police investigation and ultimately avoid arrest, they routinely protest their innocence to officers or criticize the propriety of police action. *See, e.g.*, *Holguin v. City of San Diego*, 135 F. Supp. 3d 1151, 1162-63 (S.D. Cal. 2015) (plaintiff, arrested for being intoxicated and uncooperative, alleged that his arrest was in retaliation for asking police to "take it easy"). They may also engage in speech that is highly offensive but nevertheless protected, such as by hurling insults and profanities at police officers. Indeed, this Court has suggested that additional First Amendment protection for such speech may be warranted in part *because* police officers are trained not to respond to such abuse. *Houston v. Hill*, 482 U.S. 451, 461-62 (1987). Most courts agree and hold police to a higher standard. *See, e.g.*, *State v. Baccala*, 163 A.3d 1, 9 (Conn. 2017) (citing cases).

Perversely, if the Court were to adopt the Ninth Circuit's rule, a suspect's insults and profanities may well suggest—especially to lay jurors—that officers responded in a retaliatory manner. After all, such words are designed to provoke, and if spoken to an average citizen would ordinarily prompt an angry and perhaps violent response. Even a suspect's more tempered criticism or disapproval of the officers could easily be alleged to have motivated an arrest.

An arrestee could also readily allege retaliatory motive when his lawbreaking is directly tied to purported expressive conduct or protest. Persons may break a law to express disagreement with the law itself or related governmental policy. *See Wayte v. United States*, 470 U.S. 598, 600-01 & n.2 (1985) (letters explaining refusal to register with Selective Service). Or they may violate the law simply to

express themselves in a manner of their own choosing. For example, protestors may encamp unlawfully on public space, using such continued occupation to expound their message. *See Dukore v. District of Columbia*, 799 F.3d 1137, 1138-39 (D.C. Cir. 2015). Protestors may also trespass on the private property of entities whose practices or views they oppose. *See, e.g.*, *Logsdon v. Hains*, 492 F.3d 334, 337-38 (6th Cir. 2007) (abortion protestors); *Joyce v. Crowder*, 480 F. App'x 954, 955 (11th Cir. 2012) (environmental activists). Because of the close connection between the offense and the expression of protest, an arrestee could well claim retaliation in these circumstances—thereby deterring officers from making legitimate and often necessary arrests for trespassing or disorderly conduct within the encampment. *See, e.g.*, *Dukore*, 799 F.3d at 1139.

Even speech that provides evidence of criminal activity may be protected. A suspect's own speech might place him at the scene of the crime, reveal a motive, or indicate that he acted with the requisite intent. But under the Ninth Circuit's standard, an officer who relies on such inculpatory statements would then become subject to a retaliatory-arrest claim. After all, the content of the arrestee's speech would admittedly be a motivating factor in such an arrest. This would apply even in the extreme circumstance where a suspect is *confessing to a crime*: For example, if a person is arrested after stating that he has burned his draft card because of his beliefs, then he could claim that his arrest was retaliatory. *E.g.*, *United States v. O'Brien*, 391 U.S. 367 (1968). To avoid liability in such a circumstance, the officer would have to show something more than probable cause—such as, for example, that police generally make arrests when they observe evidence of the alleged crime. It is not clear, however, how an arresting officer

could possibly prove this, and even if he could, there is no reason why an officer who arrests a suspect based on the suspect's own inculpatory statements should be forced to litigate in that circumstance.

The risk of a subsequent suit for retaliatory arrest exists even in the rare case where the suspect says nothing to the officer directly. Officers often overhear, or receive reports of, statements made by the suspect. And even where the suspect himself is entirely silent, he could later claim that something as simple as the bumper sticker on his car or a slogan on his t-shirt was protected speech giving rise to the arrest.

2. *Adopting the Ninth Circuit's rule would effectively transform the standard for arresting officers' liability, including qualified immunity, from an objective test into a subjective one.*

Because a showing of protected speech poses little obstacle, a test for retaliatory-arrest claims that fails to incorporate probable cause as an element would turn on the subjective motivations of the arresting officers. It would thereby supplant the objective standards that this Court has firmly established for assessing the constitutionality of an arrest. "[T]his Court has long taken the view that 'evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.'" *Kentucky v. King*, 563 U.S. 452, 464 (2011) (quoting *Horton v. California*, 496 U.S. 128, 138 (1990)).

Qualified immunity would provide arresting officers little protection if it too turned on their subjective motivations. Qualified immunity is designed "to spare a defendant not only unwarranted liability, but

unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). As this Court has established, an objective standard for assessing officers' actions is needed to ensure that burdensome lawsuits do not occupy an unwarranted amount of law enforcement's time and attention. *See Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982). That is because "[j]udicial inquiry into subjective motivation . . . may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues." *Id.* at 817. After extensive discovery, arresting officers would then likely have to undergo a trial, since "questions of subjective intent so rarely can be decided by summary judgment." *Id.* at 816. As the *Harlow* Court concluded, basing qualified immunity on an officer's subjective motivations "has proved incompatible with [this Court's] admonition . . . that insubstantial claims should not proceed to trial." *Id.* at 815-16.

Under the Ninth Circuit's rule, an officer with retaliatory motive would not be entitled to qualified immunity even if the arrest were objectively reasonable, *i.e.*, supported by probable cause. To be sure, if it were unclear whether the speech was protected, qualified immunity would apply. Otherwise, though, the retaliatory motive establishing a First Amendment violation might defeat qualified immunity, as plaintiffs will no doubt argue, and thus qualified immunity would provide officers no added protection.

If needed, this Court could (and should) hold that, to the contrary, the existence of probable cause, or arguable probable cause, entitles an officer to qualified immunity on a First Amendment retaliatory-arrest claim. *See Crawford-El v. Britton*, 523 U.S. 574, 612

(1998) (Scalia, J., dissenting). Such a holding would preserve that doctrine's protections for official acts that are objectively reasonable, whatever the subjective intent. But, especially without such an extension of qualified immunity, the Ninth Circuit's rule would institute a profound and unwarranted shift in assessing officers' liability for arrests. It would replace well-established objective standards with an open-ended inquiry into an officer's subjective motivations.

B. A subjective test would discourage officers from enforcing the law and heighten the volatility of arrest situations.

The resulting litigation over officers' subjective motivations for arrests would impose significant societal costs. These would be beyond just the "general costs of subjecting government officials to the risks of trial," such as the "distraction of officials from their governmental duties." *Harlow*, 457 U.S. at 816. First, adopting the Ninth Circuit's standard would have a particularly adverse effect on the ability of states to protect their citizens from crime. "States have a strong interest in protecting public safety by taking into custody those persons who are reasonably suspected of having engaged in criminal activity, even where there has been no opportunity for a prior judicial determination of probable cause." *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991). Among its other purposes, a custodial arrest "ensures that a suspect appears to answer charges and does not continue a crime." *Virginia v. Moore*, 553 U.S. 164, 173 (2008).

The threat of damages claims based on an officer's subjective motivations would dissuade officers from making legitimate arrests. Officers who acted without retaliatory animus would still have reason to fear not only the burdens of litigation, but also the potential

liability that could result. They would be aware that a retaliatory motive is "easy to allege and hard to disprove." *Crawford-El*, 523 U.S. at 584-85. They also often must act "on the spur (and in the heat) of the moment." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). Yet an officer would undoubtedly hesitate to act decisively knowing that a court or jury would later dissect the constitutionality of his actions based on its own reconstructed view of his thought processes. Officers would thus be incentivized to forgo arrest even when such action is appropriate to secure public safety. *See Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 337-38 (2012) (explaining rejection of proposed rule for warrantless arrests because "the risk of violating the Constitution would have discouraged [officers] from arresting criminals in any questionable circumstances").

Additionally, police encounters with suspects would become more perilous. Criminals would learn that confrontational speech could be particularly effective in forestalling arrest because of its added value for a potential lawsuit and the deterrent effect that would have on all but the most resolute officers. Indeed, from the lawbreaker's perspective, the more confrontational and incendiary the speech, the better. Officers meanwhile might reasonably perceive that the suspect's hostility could turn violent. Potential arrest situations are already tense, uncertain, and subject to sudden escalation. Adding a further element of provocation into such a fraught situation would increase the risk of harm to all involved.

As this Court acknowledged in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), "[i]n deciding whether to arrest, police officers often make split-second

judgments." *Id.* at 1953. And "[t]he content of the suspect's speech might be a consideration in circumstances where the officer must decide whether the suspect is ready to cooperate, or, on the other hand, whether he may present a continuing threat to interests that the law must protect." *Id.* (citing *District of Columbia v. Wesby*, 138 S. Ct. 577, 587 (2018) ("suspect's untruthful and evasive answers to police questioning could support probable cause")). The "complexity of proving (or disproving) causation in these cases creates a risk that the courts will be flooded with dubious retaliatory arrest suits," absent the requirement that a plaintiff allege a lack of probable cause. *Id.* And the prospect of a flood of suits will no doubt have a strong deterrent effect on officers navigating already-fraught pre-arrest encounters with dangerous suspects. For those reasons, a bright-line rule incorporating lack of probable cause as an element of a retaliatory-arrest claim is necessary.

C. Reliance on other factors, such as whether a law is commonly enforced, is not an adequate substitute for proving a lack of probable cause.

In the past, plaintiffs have suggested that the causal role of retaliatory animus could be proven by the frequency or infrequency with which suspects are arrested for a given offense, rather than by the presence or absence of probable cause. *See* Brief for Petitioner at 35-36, *Lozman*, 138 S. Ct. 1945 (No. 17-21), 2017 WL 6616986 (Dec. 22, 2017) ("*Lozman* Br."). But such a standard would only compound the problem. To protect themselves from suit, officers would need to know whether the offense for which they have probable cause is commonly enforced. This would place arresting officers in an impossible position. Whether

a law is generally enforced is not a test that an officer can apply on the scene, especially in the brief time available to decide whether to arrest. *See Florence*, 566 U.S. at 338 ("Officers who interact with those suspected of violating the law have an essential interest in readily administrable rules." (internal quotation marks omitted)).

Under that standard, some plaintiffs have opined that where a "serious crime" has been committed there will be no liability, since presumably police arrest for such crimes virtually every time they can. *Lozman* Br. 35-36. But this does little, if anything, to ease an officer's predicament. Only an estimated 5% of arrests are for violent felonies (murder and nonnegligent manslaughter, rape, robbery, and aggravated assault). Federal Bureau of Investigation, *Crime in the United States 2016*, https://tinyurl.com/yatbcyox (last visited Aug. 24, 2018). Most arrests are presumably for misdemeanors. *See id.*; Cal. Dep't of Justice, *Arrests Reported from 2007-2016*, https://openjustice.doj.ca.gov/2016/arrests (reporting twice as many misdemeanor arrests as felony arrests in California).

Not only would a rule based on the frequency of arrests for particular crimes be impossible for an officer to apply in the field, it would be very difficult for him to meet in his own defense at trial. Identifying a workable, meaningful measure of how commonly a law is enforced through arrest is a tall order. The requisite statistics for any such measure may not be generally available. Beyond those insurmountable obstacles, a stream of other complications would arise in trying to measure whether police generally arrest for an offense. Is the relevant geographic pool nationwide, or by state, police department, or police district? How narrowly or broadly should the relevant

offense be categorized? How is the measure affected when multiple or overlapping offenses are involved? The list goes on.[1]

What is more, a standard that looks to whether a law is generally enforced to determine liability, rather than looking to probable cause, would inhibit the flexibility of police to address particular community problems as they arise. It would instead encourage police to divide criminal offenses into two categories: those for which they should always arrest and those for which they should never arrest. After all, to the extent that a law is enforced at every possible opportunity through an arrest, then officers would have a strong, if not airtight, defense to a retaliatory-arrest claim. Conversely, police would be inclined to forgo an arrest if the criminal law that has been violated will not, or cannot, be regularly enforced at all other times and locations. Fearing a retaliatory-arrest claim, officers would be especially hesitant to make legitimate arrests for many types of offenses that might not be considered "commonly enforced" or clearly "serious."

Among other problems, this inflexible, "all or nothing" approach is antithetical to the concept of community-oriented policing and other proactive policing strategies. Such a rule would reinforce an

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[1] Similar problems arise with a standard based on whether the officer must make a "singularly swift, on the spot, decision" when "the safety of [a] person" or property "is in jeopardy." *Reichle v. Howards*, 566 U.S. 658, 671 (2012) (Ginsburg, J., concurring). In a plethora of cases—ranging from trespass to the violation of noise ordinances—such a standard would offer no protection to officers. And plaintiffs would invariably allege factual disputes about whether the safety of persons or property was truly in jeopardy, making the standard unworkable in practice.

outdated view of policework: one that is basically reactive, waiting for a crime to be reported or observed and then responding in some automatic fashion based on the seriousness of the offense under the criminal code. *See* Alafair Burke, *Policing, Protestors, and Discretion*, 40 Fordham Urb. L.J. 999, 1009-10 (2013); *see generally* Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 Calif. L. Rev. 1513 (2002) (contrasting community policing strategies with the more reactive, traditional model); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L. Rev. 551 (1997) (describing community and problem-oriented policing).

By contrast, community-oriented policing emphasizes that "[l]aw enforcement agencies should work with community residents to identify problems and collaborate on implementing solutions that produce meaningful results for the community." *Final Report of the President's Task Force on 21st Century Policing* 45 (2015), http://www.theiacp.org/Portals/0/taskforce_finalreport.pdf. Community policing calls for decentralized decision-making, involving "increasing tolerance for risk taking in problem-solving efforts, and allowing officers discretion in handling calls." Office of Community Oriented Policing Servs., U.S. Dep't of Justice, *Community Policing Defined* 5-6 (2014), https://tinyurl.com/y7gows48. It also envisions continually identifying and prioritizing problems, designing responses, and evaluating their effectiveness. *Id.* at 10-12.

The mistaken premise of a frequency-of-arrest-based approach is that certain offenses are too minor, or result too infrequently in arrest, such that any

arrest for those offenses would be inherently suspect. Far from it. Sometimes heightened enforcement of certain "minor" criminal laws can be quite important to a community. "[T]he narrow focus of the past on the seeming triviality of incidents of minor disorder ignores the communal harms that can be visited upon a neighborhood when these incidents multiply into a neighborhood problem." Livingston, *supra*, at 591. "[I]n community policing, police often exercise their discretion by addressing low-level crimes that might not warrant attention in comparison to more serious crimes, but which the community views as detrimental to their quality of life." Burke, *supra*, at 1010-11. Potential community concerns are manifold and could include, as just a few examples, late-night noise and disorderly conduct, trespassing, graffiti, illegal dumping, or package theft.

At the same time, a community-oriented approach encourages police "to think innovatively" and "view making arrests as only one of a wide array of potential responses." *Community Policing Defined*, *supra*, at 10. By seeking the community's input as to both problems and responses, "community policing tends to be extremely localized." Burke, *supra*, at 1011. Any demand that arresting officers show that police generally arrest for the offense would ignore the dynamic nature of community policing and undercut its application. *See* Livingston, *supra*, at 650-70 (arguing that political and administrative tools are more apt mechanisms for managing police discretion in the era of community policing than judicial review).

II. States And Localities Have Effective Mechanisms For Ensuring That Officers Do Not Make Retaliatory Arrests.

Allowing a retaliatory-arrest claim to proceed despite the existence of probable cause is especially unwarranted given the comprehensive procedures that state and local jurisdictions have developed to address police misconduct and control the power of arrest. Those safeguards can ably protect against retaliatory arrests without eliminating the objective, probable-cause standard for an arrest's constitutionality and opening the floodgates to damages suits. State and local governments are better situated to fashion flexible remedies that balance effective law enforcement with proper restraints on police officers and redress for their misdeeds.

A. Administrative review of police conduct provides an effective alternative for addressing allegations of retaliation through courts.

State and local jurisdictions are capable of handling citizen complaints against officers for improper conduct, including retaliatory arrests. Of course, judicial safeguards will always remain, such as when an arrest is made without probable cause or where criminal laws lack "minimal guidelines to govern law enforcement." *Chicago v. Morales*, 527 U.S. 41, 60 (1999). But regardless of the potential for civil liability, officers who arrest or take other actions for improper reasons are subject to disciplinary action. Both internal and external administrative processes exist throughout the nation to provide an efficient and effective response to complaints against officers who violate the law or local policies. This provides a valuable check against retaliatory arrests.

Law enforcement agencies, including through internal affairs units, receive and resolve citizen complaints as an important part of their law enforcement functions. There is widespread recognition among law enforcement that holding officers accountable for their actions is essential to maintain the public legitimacy that police need to be effective. Int'l Ass'n of Chiefs of Police, *Building Trust Between the Police and the Citizens They Serve* 5-7 (2009) ("*Building Trust*"), https://ric-zai-inc.com/Publications/cops-p170-pub.pdf; *see also* Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help Police Fight Crime in Their Communities?*, 6 Ohio St. J. Crim. L. 231, 233-38 (2008) (citing procedural fairness as a source of police legitimacy, and legitimacy as a major factor in the success of law enforcement). Indeed, such public accountability is another component of community-oriented policing. *Building Trust*, *supra*, at 5-7. Citizen complaints also assist a police department in supervising and managing its officers. Those complaints not only help identify officers who should be monitored more closely, disciplined, or removed for misconduct, but also reveal areas where better training or enhanced supervision is needed. In short, police departments have an interest as well as a duty in appropriately investigating citizen complaints.

Citizen review boards, or other types of external review, are another mechanism to address citizen complaints. "[C]ivilian oversight has been increasingly institutionalized as a regular feature of policing in cities and counties across the U.S." Joseph De Angelis et al., *Civilian Oversight of Law Enforcement: Assessing the Evidence* 49 (2016), https://tinyurl.com/y94aelhc (identifying "more than 140 civilian oversight agencies, with almost all large cities having some sort of civilian oversight"). There is a wide range

of civilian oversight—from "limited authority to review[ ] and mak[e] recommendations to boards that have investigative and subpoena powers"—and each community may consider its own form of civilian oversight that meets its needs. *The President's Task Force on 21st Century Policing Implementation Guide* 7 (2015), https://tinyurl.com/ycznok28. Among its features, civilian oversight can provide independent review of citizen complaints.

In the District of Columbia, for example, a citizen may file a complaint with the independent Office of Police Complaints, which is overseen by a publicly appointed board. D.C. Code §§ 5-1104, 5-1105. The Office of Police Complaints investigates complaints of harassment (among other types of complaints), which broadly includes arrests in violation of the law or internal police guidelines. D.C. Mun. Regs. tit. 6A, §§ 2104.1, 2199.1. It has the power to subpoena witnesses and documents. D.C. Code § 5-1111(c). The Office of Police Complaints even has direct and immediate access to the videos from body-worn cameras that all D.C. Metropolitan Police Department patrol officers now use. D.C. Office of Police Complaints, *Annual Report 2017*, at 18-19 (Oct. 31, 2017), https://tinyurl.com/ycvouesc. If the Office sustains a complaint, it refers the matter to the Metropolitan Police Department to recommend, and the police chief to decide, the imposition of discipline. D.C. Code § 5-1112. Generally, the police chief may not reject the merits determination of the Office of Police Complaints. *Id.* § 5-1112(e), (g).

Other cities have similar review boards that investigate citizen complaints against police officers. In New York City, an independent Civilian Complaint Review Board with subpoena power investigates several types of complaints—including complaints of abuse of

authority—and makes merits findings. N.Y.C., N.Y., Rules tit. 38A, §§ 1-02(a), 1-23(d). If it substantiates the allegations, the Board recommends a type of discipline and, in the most serious cases, can prosecute disciplinary charges against the officer at an administrative trial. *See* N.Y.C. Civilian Complaint Rev. Bd., *Police Discipline*, https://www1.nyc.gov/site/ccrb/prosecution/police-discipline.page (last visited Aug. 24, 2018). If the police commissioner intends to impose discipline at a level below that recommended by the board or administrative tribunal, the commissioner must provide a detailed explanation of the reasons and allow the board an opportunity to respond. N.Y.C., N.Y., Rules tit. 38A, § 1-46(f).[2]

External review can take other forms, such as review of a department's internal affairs investigations. For example, the Los Angeles Police Department has an independent inspector general, who is selected by a civilian Board of Police Commissioners. L.A., Cal., Charter vol. I, § 571(b)(4). The inspector general's office oversees the police department's handling of complaints of police misconduct. L.A., Cal., Charter vol. I, § 573. It receives copies of every complaint filed,

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[2] These civilian review agencies in the District of Columbia and New York City regularly report on complaint dispositions, including discipline and other remedial actions. *See* D.C. Office of Police Complaints, *Annual Report 2017*, *supra*, at 32, https://tinyurl.com/ycvouesc; N.Y.C. Civilian Complaint Rev. Bd., *Semi-Annual Report, Jan.-June 2017*, at 25-31 (Dec. 6, 2017), https://tinyurl.com/yc7wjjcz. Of course, disciplinary action is imposed in many other instances directly through police departments. Civilian review agencies also attempt to resolve complaints through mediation, which is held if both parties agree and can be very effective. *Annual Report 2017*, *supra*, at 22-23; *Semi-Annual Report, Jan.-June 2017*, *supra*, at 32-36. As the statistics show, civilian complaints produce meaningful outcomes, not empty processes.

audits selected investigations, and conducts systemic reviews of the disciplinary system. *See* L.A. Police Dep't, *Office of the Inspector General*, http://www.lapdonline.org/police_commission/content_basic_view/1076 (last visited Aug. 24, 2018). It also has subpoena power to conduct its own investigations. L.A. Bd. of Police Comm'rs, Policies and Authority Relative to the Inspector General § VII (approved Nov. 21, 2000), https://tinyurl.com/y7dab2vd.

Moreover, through legislation and policymaking, states can provide oversight of local citizen complaint processes. *See, e.g.*, Cal. Penal Code § 832.5(a) (requiring each police department to establish and publicize its procedure to investigate civilian complaints); *id.* § 837.2(e)(1) (requiring that the complainant receive timely, written notification of the complaint's disposition); Cal. Dep't of Justice, *Policy Governing Citizen Complaints Against Law Enforcement* (Jan. 2017), https://tinyurl.com/ycqvhuy2 (establishing that the Attorney General will review citizen complaints against local law enforcement agencies for possible investigation after exhaustion of local processes).

Some states have also directed that commissions develop detailed standards that law enforcement agencies must implement to investigate citizen complaints. In Connecticut, as specified by statute, those standards address issues such as the manner of acceptance of complaints, investigation protocols, and the documentation of the receipt of complaints and their dispositions. *See* Conn. Gen. Stat. § 7-294bb; Conn. Police Officer Standards & Training Council, *Mandatory Uniform Policy: Complaints that Allege Misconduct by Law Enforcement Agency Personnel* (May 14, 2015), https://tinyurl.com/y93qdw3y. Other

states have similar statutes. *See* Me. Rev. Stat. tit. 25, § 2803-B; Md. Code Ann., Pub. Safety § 3-519; N.J. Stat. § 40A:14-181; Vt. Stat. Ann. tit. 20, § 2402; *see also* R.I. Gen. Laws § 21.2-8.

Regardless of the particular mechanism in each jurisdiction, administrative processes are available to thoroughly investigate complaints of retaliatory arrest and impose appropriate disciplinary action, thus making a damages remedy unnecessary for deterrence and retribution.

B. Additional protections exist through limitations on the arrest power and through policies on arrest alternatives.

To ensure that the power of arrest is used appropriately, states may also limit officers' authority to conduct a warrantless arrest. States generally preclude arrest without a warrant for misdemeanors committed outside of an officer's presence. *See Atwater*, 532 U.S. at 355-60 (listing statutes). Many states have also chosen "more restrictive safeguards through statutes limiting warrantless arrest for minor offenses." *Id.* at 352. Such safeguards include provision for release on a citation or summons, with a promise to appear later to answer the charge, in lieu of a full custodial arrest. By statute or court rule, almost all states provide for citation release for some misdemeanors (and occasionally even felonies). Nat'l Conference of State Legislatures, *Citation in Lieu of Arrest* (updated Oct. 23, 2017), https://tinyurl.com/yd9wsf9d (providing summary chart of state laws).

Twenty-four states create at least "a presumption to issue citations for certain crimes or under certain circumstances." *Id.* For example, this Court's decision in *Moore* arose because of a Virginia statute that

generally directs officers to issue citations for most misdemeanor traffic offenses. 553 U.S. at 167; *see* Va. Code § 46.2-936. Another Virginia statute generally requires citations for most misdemeanors that are not punishable by a jail sentence. Va. Code § 19.2-74. These and other similar state statutes typically have exceptions permitting a custodial arrest, such as where there are reasonable grounds to believe that the person will not appear to answer the citation, will continue the offense, or poses a danger to persons or property. *Citation in Lieu of Arrest, supra.*

Where state law might not create a presumption or otherwise establish guidelines for citation release, localities may set their own policies. For example, New York City officials announced that police will issue summonses and "no longer arrest individuals who commit [low-level] offenses—such as littering, public consumption of alcohol, or taking up two seats on the subway—unless there is a demonstrated public safety reason to do so." Press Release, *District Attorney Vance, Commissioner Bratton, Mayor De Blasio Announce New Structural Changes to Criminal Summonses Issued in Manhattan* (Mar. 1, 2016), https://tinyurl.com/ybcwe806. Other local governments have taken similar measures. *See, e.g.*, Edward Sheehy et al., *Greenville Police to Issue Citations for Small Crimes Instead of Arrests*, WITN.com News (Oct. 9, 2017), https://tinyurl.com/y9ow3ll9. While discretionary determinations about public safety will still likely be involved in the decision whether to issue a citation in lieu of arrest, guidelines and policies can ensure that those determinations are based on only proper considerations.

As this Court has recognized, "it is in the interest of the police to limit petty-offense arrests, which carry

costs that are simply too great to incur without good reason." *Atwater*, 532 U.S. at 352. States too recognize those costs and have fashioned laws and policies to achieve an appropriate balance of interests. *Citation in Lieu of Arrest, supra*. The arrest limitations adopted by states and localities further reduce any potential for retaliatory arrests.

CONCLUSION

This Court should reverse the decision of the court of appeals.

Respectfully submitted,

KARL A. RACINE
Attorney General for the
District of Columbia

LOREN L. ALIKHAN
Solicitor General
Counsel of Record

CAROLINE S. VAN ZILE
Deputy Solicitor General

CARL J. SCHIFFERLE
Senior Assistant Attorney General

D.C. OFFICE OF THE
ATTORNEY GENERAL
441 4th Street, NW
Suite 630 South
Washington, D.C. 20001
(202) 727-6287
loren.alikhan@dc.gov

Counsel for Amicus Curiae
District of Columbia

ADDITIONAL COUNSEL

CYNTHIA H. COFFMAN
Attorney General
STATE OF COLORADO
1300 Broadway, 10th Floor
Denver, CO 80203

CURTIS T. HILL, JR.
Attorney General
STATE OF INDIANA
Office of the
Attorney General
200 West Washington Street
Room 219
Indianapolis, IN 46204

JANET T. MILLS
Attorney General
STATE OF MAINE
6 State House Station
Augusta, ME 04333-0006

TIM FOX
Attorney General
STATE OF MONTANA
215 North Sanders Street
Helena, MT 59620-1401

MIKE HUNTER
Attorney General
STATE OF OKLAHOMA
313 NE 21st Street
Oklahoma City, OK 73105

PETER F. KILMARTIN
Attorney General
STATE OF RHODE ISLAND
150 South Main Street
Providence, RI 02903

LAWRENCE G. WASDEN
Attorney General
STATE OF IDAHO
P.O. Box 83720
Boise, ID 83720-0010

DEREK SCHMIDT
Attorney General
STATE OF KANSAS
120 SW 10th Avenue
2nd Floor
Topeka, KS 66612-1597

JEFF LANDRY
Attorney General
STATE OF LOUISIANA
1885 North Third Street
Baton Rouge, LA 70802

JIM HOOD
Attorney General
STATE OF MISSISSIPPI
Post Office Box 220
Jackson, MS 39205

HECTOR BALDERAS
Attorney General
STATE OF NEW MEXICO
408 Galisteo Street
Santa Fe, NM 87501

JOSH SHAPIRO
Attorney General
COMMONWEALTH OF
PENNSYLVANIA
Strawberry Square
16th Floor
Harrisburg PA 17120

ALAN WILSON
Attorney General
STATE OF SOUTH CAROLINA
Rembert C. Dennis
Office Building
P.O. Box 11549
Columbia, SC 29211-1549

SEAN D. REYES
Attorney General
STATE OF UTAH
350 North State Street
Suite 230
Salt Lake City, UT 84114-2320

PETER K. MICHAEL
Attorney General
STATE OF WYOMING
2320 Capitol Avenue
Cheyenne, WY 82002

No. 17-1174

IN THE

Supreme Court of the United States

LUIS A. NIEVES AND BRYCE L. WEIGHT,
Petitioners,

v.

RUSSELL P. BARTLETT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE FIRST AMENDMENT FOUNDATION AND FANE LOZMAN AS AMICI CURIAE IN SUPPORT OF RESPONDENT

GINGER D. ANDERS
Counsel of Record
CHRISTOPHER M. LYNCH
MUNGER, TOLLES & OLSON LLP
1155 F Street NW, 7th Floor
Washington, DC 20004
(202) 220-1107
ginger.anders@mto.com

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INTEREST OF AMICI CURIAE[1]

The First Amendment Foundation is a nonprofit organization dedicated to promoting government openness and transparency throughout Florida, at both the state and local government levels. In addition to working with volunteers to audit government compliance with open meetings, public records, and other "sunshine" laws, the Foundation educates government officials, journalists, and the public about citizens' rights to obtain information from their governments. The Foundation also operates a hotline to answer questions about open government laws, handling more than 150 inquiries per month. Some of these inquiries come from members of the public expressing concerns about government retaliation or intimidation after exercising their right to request information.

A number of the Foundation's members have reported facing intimidation or retaliation for exercising their First Amendment rights. For instance, one member told the Foundation that she submitted a public records request at a police station as part of one of the Foundation's compliance audits—and was followed home by the police. Another member reported to the Foundation that he requested public records, and went to City Hall to pick them up—and was arrested for trespass upon arriving. And yet another informed the Foundation that, after he request-

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[1] Counsel for all parties have consented to the filing of this brief. In accordance with Rule 37.6, amici confirm that no party or counsel for any party authored this brief in whole or in part, and that no person other than amici or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

ed public records in order to investigate a potential public safety hazard, he was almost arrested; was invoiced for nearly $1,000; and was threatened by the city clerk.

In light of its mission and the reported experiences of its members, the Foundation has a strong interest in the public's ability to exercise its First Amendment rights, such as the right to request information from government officials. Accordingly, the Foundation has an interest in this case.

Fane Lozman was the petitioner in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), which presented last term the same question presented in the instant case. Mr. Lozman was subjected to retaliatory arrest when speaking at a city council meeting in Riviera Beach, Florida, after a council member who had previously suggested that the city use its resources to "intimidate" Mr. Lozman for suing the city ordered him "carr[ied] out" of the meeting. *Id.* at 1949-50. Mr. Lozman has an interest in this case as someone who has previously been subjected to retaliatory arrest, litigated this issue, and whose ongoing political activity and dispute with the City of Riviera Beach lead him to believe he may be subjected to retaliatory arrest in the future.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

It is a bedrock principle of First Amendment law that government officials may not retaliate against individuals for engaging in constitutionally protected speech. In a variety of contexts, this Court has recognized that when government officials take an ad-

verse action against an individual for the purpose of punishing or suppressing her speech—whether the government deprives the speaker of a government contract, dismisses her from public employment, or treats her unfavorably in prison—the government unlawfully chills expression. *See, e.g., Board of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 685 (1996); *Branti v. Finkel*, 445 U.S. 507, 515 (1980); *Crawford-El v. Britton*, 523 U.S. 574, 578, 588 n.10 (1998). Under the established framework for analyzing such retaliation claims, government defendants will be liable for violating the First Amendment if the factfinder concludes that the defendants would not have taken action against the plaintiff but for their intent to punish or suppress protected expression. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

As the Court recognized last term, there are "substantial arguments" that this standard should apply to retaliatory arrest claims, particularly because "there is a risk that some police officers may exploit the arrest power as a means of suppressing speech." *Lozman*, 138 S. Ct. at 1953. But despite those concerns, the Court was not required to confront that issue in Mr. Lozman's case, because there the Court understood the source of the retaliation to be "official policy" rather than the abuse of power of individual police officers. *Id.* at 1954. Nonetheless, the Court held that the standard retaliation test should apply in the retaliatory arrest context for claims like Mr. Lozman's. *Id.* at 1954-55.

This case squarely presents the troubling context recognized by the Court last term, where police officers may have exploited the arrest power to penalize a

member of the public for his speech activity. Two police officers arrested Respondent after interactions in which he (a) declined to be interviewed by one; and (b) questioned the authority of the other to question a minor outside the presence of a parent or guardian. *Bartlett v. Nieves*, No. 4:15-cv-00004-SLG, 2016 WL 3702952, at *1 (D. Alaska July 7, 2016). Such retaliatory arrests are an especially potent means of chilling First Amendment activity, for two reasons. First, retaliatory arrests not only silence the individual in question, but also send the message to others in the community that expression of disfavored views or questioning police misconduct may result in being taken into law enforcement custody. Second, the power to arrest individuals, including for minor offenses, is particularly susceptible to misuse for retaliatory purposes. As a practical matter, police and other officials have broad discretion to arrest, or order the arrest of, individuals for an exceedingly wide range of infractions, however minor. The sheer breadth of that discretion has made retaliatory arrests in response to protected First Amendment activity a serious problem, as recent media reports and retaliatory arrest cases demonstrate.

In many cases, the only way for a citizen to deter such government retaliation, and to seek redress for past retaliation, is through an after-the-fact damages action. In order to ensure that such suits remain an effective check on all retaliatory arrests, this Court should hold that the *Mt. Healthy* framework applies in this context, as it does in Equal Protection challenges to racially motivated arrests, to First Amendment and Equal Protection challenges to other government actions that single out citizens for disfavored treatment for impermissible motives, and to retalia-

tory arrest claims like Mr. Lozman's. That framework properly recognizes that the governmental motive behind any restriction on speech is "a hugely important—indeed, the most important—explanatory factor in First Amendment law." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 415 (1996). In fact, the Court has explicitly held that illicit motive is the key consideration in evaluating government retaliation for an individual's exercise of First Amendment rights. *See Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1418 (2016) (affirming the primacy of official motivation where the government took adverse action against an individual based on the mistaken belief that he had engaged in protected speech). And just last term, this Court concluded in Mr. Lozman's case that the *Mt. Healthy* framework applies in retaliatory arrest cases where a plaintiff alleges an official policy of retaliation for petitioning activities undertaken prior to and separate from the events of the plaintiff's arrest. 138 S. Ct. at 1954-55. The same rule should apply here.

By contrast, holding that the existence of probable cause renders official intent irrelevant would provide standing pretext for governmental officials to single out and punish dissenters without consequence. In light of the innumerable minor infractions contained in state and local codes, and the relative ease of demonstrating probable cause, government defendants will almost always be able to point to one or more offenses for which probable cause existed. This case provides a particularly salient example: Petitioners defeated Respondent's claim in the district court by establishing that his arrest was supported by probable cause of the offense of harassment—an

offense different than the one for which he was arrested and charged. Compare *Bartlett*, 2016 WL 3702952 at *3 with *id.* at *11. If probable cause defeats a First Amendment retaliatory arrest claim, then, municipalities and officials will be insulated from liability for most retaliatory arrest claims.

The danger of being arrested in retaliation for engaging in protected speech—without recourse—chills the exercise of core First Amendment rights, such as questioning or otherwise criticizing the government. The chilling effect is likely to be especially acute in smaller towns and cities or other small, isolated communities across America, where vocal critics often continuously interact with local officials and where there are likely to be fewer neutral figures with the power to prevent or discourage retaliation. This Court should therefore reverse the decision below and hold that probable cause, standing alone, does not automatically defeat a First Amendment claim for retaliatory arrest.

ARGUMENT

A RULE THAT PROBABLE CAUSE, STANDING ALONE, AUTOMATICALLY DEFEATS A FIRST AMENDMENT RETALIATORY ARREST CLAIM WOULD SEVERELY UNDERMINE FREEDOM OF EXPRESSION.

The First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times Co. v. Sul-*

livan, 376 U.S. 254, 270 (1964). Reflecting this "profound national commitment" to the freedom of expression, *id.*, "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out[.]" *Hartman v. Moore*, 547 U.S. 250, 256 (2006). The ability to bring a damages action when such "retaliatory actions" occur, *id.*, serves as both an important check on government abuse, and an opportunity—often the only one—for the individual to vindicate her rights. *See, e.g.*, 42 U.S.C. § 1983; *Robertson v. Wegmann*, 436 U.S. 584, 590–91 (1978).

Adopting the rule advocated by Petitioners would severely limit the effectiveness of this check because it would bar a plaintiff from stating a claim for retaliatory arrest where there is probable cause that she has committed *any* infraction, no matter how strong the evidence of retaliatory motive, or how minor the infraction. Given the myriad federal, state, and local laws and regulations that govern everyday activities, most people routinely—and unintentionally—commit minor infractions. Under the decision below, probable cause to believe a person has committed any of these infractions will immunize a retaliatory arrest from First Amendment challenge, leaving citizens with no effective means of addressing the chilling effect such arrests create.

A. Arrests Carried Out In Retaliation For Protected Speech Are A Serious Problem.

Given the wide range of offenses that can lead to arrest, officers can almost always identify some probable cause sufficient to justify an arrest. That is a

serious problem, not only in theory, but also as borne out by the experience of citizens across the country.

1. Most individuals, often inadvertently, commit some sort of arrestable infraction on a regular, if not daily, basis. Consider these observations about the typical American traffic code:

> There is no detail of driving too small, no piece of equipment too insignificant, no item of automobile regulation too arcane to be made the subject of a traffic offense. Police officers in some jurisdictions have a rule of thumb: the average driver cannot go three blocks without violating some traffic regulation. . . . For example, in any number of jurisdictions, police can stop drivers not only for driving too fast, but for driving too slow. In Utah, drivers must signal for at least three seconds before changing lanes; a two second signal would violate the law. In many states, a driver must signal for at least one hundred feet before turning right; ninety-five feet would make the driver a[n] offender. . . . Many states have made it a crime to drive with a malfunctioning taillight, a rear-tag illumination bulb that does not work, or tires without sufficient tread. They also require drivers to display not only license tags, but yearly validation stickers, pollution control stickers, and safety inspection stickers; driving without these items displayed on the vehicle in the proper place violates the law.

David A. Harris, *"Driving While Black" and All Other Traffic Offenses*, 87 J. Crim. L. & Criminology 544, 557–59 (1997) (citations omitted).

Such intricate regulatory systems are not unique to the traffic code—thousands of federal and state laws criminalize a wide range of activity. *See, e.g.*, *Overcriminalization*, Nat'l Ass'n of Criminal Def. Lawyers[2] (observing that there are "over 4,450 crimes scattered throughout the federal criminal code, and untold numbers of federal regulatory criminal provisions"); *Overcriminalization*, Right on Crime[3] (observing that Texas alone has more than 1,700 crimes on the books).

Officers have wide discretion under state and federal law to arrest individuals for these offenses, however minor. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 323, 344 & nn.12–13, 355–60 (2001); U.S. Dep't of Justice Civil Rights Division, Investigation of the Ferguson Police Dep't 82 (2015)[4] (discussing the Ferguson Police Department's "aggressive enforcement of even minor municipal infractions"). "The breadth of street crime violations—loitering, trespassing, gang injunctions, and the like—confers vast power on urban police that permits widespread arrests for petty offenses." Alexandra Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313, 1359 (2012).

And even if an individual is not arrested at the time of an infraction, she may be subject to later arrest for a missed court appearance or missed payment relating to that infraction. *See* Investigation of the Ferguson Police Dep't 55; *see also id.* ("The large number of warrants issued by the court . . . is due ex-

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[2] https://www.nacdl.org/overcrim/ (last visited Oct. 4, 2018).
[3] http://rightoncrime.com/category/priority-issues/overcriminalization/ (last visited Oct. 4, 2018).
[4] https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

clusively to the fact that the court uses arrest warrants and the threat of arrest as its primary tool for collecting outstanding fines for municipal code violations."); *id.* at 56 ("From 2010 to December 2014, the offenses (besides Failure to Appear ordinance violations) that most often led to a municipal warrant were: Driving While License Is Suspended, Expired License Plates, Failure to Register a Vehicle, No Proof of Insurance, and Speed Limit violations.").

The sheer breadth of police discretion gives rise to a significant danger that officers or other officials will sometimes decide to arrest individuals for improper reasons—including in retaliation for their protected speech.

2. That danger is hardly hypothetical, as a survey of current events demonstrates. For instance, last year, a federal court granted a preliminary injunction in favor of plaintiffs alleging that police had engaged in unconstitutional conduct in connection with protests following a state-court criminal case verdict, enjoining defendant City of St. Louis from, among other things, "[d]eclar[ing] an unlawful assembly": (1) "when the persons against whom it would be enforced are engaged in expressive activity, unless the persons are acting in concert to pose an imminent threat to use force or violence or to violate a criminal law with force or violence," or (2) "for the purpose of punishing persons for exercising their constitutional rights to engage in expressive activity." *See Ahmad v. City of St. Louis*, No. 4:17 CV 2455 CDP, 2017 WL 5478410, at *1, *10, *18 (E.D. Mo. Nov. 15, 2017).

This problem reaches not only protesters but also journalists. For example, also last year, Public News

Service reporter Dan Heyman was reportedly arrested based on alleged willful disruption of a state-government process, after asking then-Health and Human Services Secretary Tom Price about health care policy. *See* Yasmeen Serhan, *The Arrest of a Journalist Asking About Health Care*, The Atlantic (May 10, 2017).[5] Reportedly, one condition of Mr. Heyman's bail was that he "had to keep away from the state capitol"—impinging on his ability to work. *See Reporter Arrested for Shouting Questions at Trump Cabinet Official*, U.S. Press Freedom Tracker (updated Sept. 6, 2017).[6] The charges against Mr. Heyman have since been dropped. *Id.* According to the U.S. Press Freedom Tracker, Mr. Heyman is one of 34 journalists to have been arrested on the job in 2017. *See Arrest / Criminal Charge*, U.S. Press Freedom Tracker.[7] Six journalists currently face criminal charges. *Id.*

3. Reported cases from around the country further demonstrate that retaliatory arrests based on protected First Amendment activity are a serious concern—and underscore the dangers of the rule advocated by Petitioners. This troubling practice often arises, as it does in this case, in the context of police arrests of individuals that result from those individuals' exercise of their First Amendment right to question or disagree with the police in non-exigent circumstances.

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[5] https://www.theatlantic.com/news/archive/2017/05/the-arrest-of-a-west-virginia-journalist/526149/.

[6] https://pressfreedomtracker.us/all-incidents/reporter-dan-heyman-arrested-shouting-questions-hhs-secretary/ (last visited Oct. 4, 2018).

[7] https://pressfreedomtracker.us/arrest-criminal-charge/ (last visited Oct. 3, 2018).

a. In *Allen v. Cisneros*, 815 F.3d 239 (5th Cir. 2016), a Houston street preacher alleged that he had been subjected to two retaliatory arrests in violation of his First Amendment rights. *Id.* at 241–43. Both times, he was arrested after preaching on the street carrying a shofar, which "is a trumpet-like instrument made from a ram's horn" that is "used in Judaism to mark the holidays of Rosh Hashanah and Yom Kippur." *Id.* at 241–43 & n.1. The preacher and the defendants had differing versions of the events that transpired, with the preacher alleging that, each time, he had been arrested after trying to film the police. *See id.* at 242–43. But because the plaintiff's "possession of his shofar independently provided reasonable suspicion for his detention" based on a "city ordinance" that "specifically prohibited 'carry[ing] or possess[ing] while participating in any demonstration' objects that 'exceed three-quarters inch in their thickest dimension,'" *id.* at 245 (alterations in original), the Fifth Circuit held that the officers should prevail as a matter of law. *See id.* at 245–47.

b. In *Alston v. City of Darien*, — F. App'x —, No. 17-15692, 2018 WL 4492422 (11th Cir. Sept. 19, 2018), the plaintiff was initially pulled over because his windows were tinted and portions of his license plate were obstructed. *Id.* at *1. The officer gave the plaintiff citations for the incident, but when he heard the plaintiff say to his wife on the phone that "[t]his is the reason I don't come to McIntosh County because it's f***ed up over here," he pulled out his taser, ordered the plaintiff out of the car, handcuffed, and arrested him. *Id.* at *1-2. The arresting officer told a second officer that he was "getting [the plaintiff] because of how he acted in the car with his wife, and he was cussing me so I will call his job and have

him fired." *Id.* at *2. The officer did in fact call and complain to the plaintiff's employer, although plaintiff was not disciplined as a result. *Id.* The Eleventh Circuit summarily affirmed dismissal of the plaintiff's retaliatory arrest claim on the ground that his arrest was supported by probable cause based on the vehicle issues for which he was pulled over, and the officers thus had qualified immunity. *Id.* at *6.

c. In *Baldauf v. Davidson*, No. 1:04-cv-1571-JDT-TAB, 2007 WL 2156065 (S.D. Ind. July 24, 2007) (hereinafter *Baldauf II*), the plaintiff was arrested after a confrontation with a police officer at a convenience store. *Id.* at *1. At one point, the officer pointed a finger at the plaintiff, but she pushed it aside. *Id.* After the confrontation, the officer told the plaintiff that "he was not going to arrest her and that she could leave." *Id.* But as the plaintiff "was leaving, she told [the officer] that she was going to file a complaint with" the police chief. *Id.* The officer then arrested her when she was talking to the police chief at the station. *Id.* The district court determined that, although the plaintiff may have had an "otherwise worthy [retaliatory arrest] claim," it was barred by the existence of probable cause that she had committed battery when she had earlier pushed aside the officer's finger. *Id.* at *1, *4; *see also Baldauf v. Davidson*, No. 1:04-cv-1571-JDT-TAB, 2007 WL 1202911, at *4 (S.D. Ind. Apr. 23, 2007) (hereinafter *Baldauf I*) (existence of probable cause as to battery). The court accordingly granted summary judgment in the defendant's favor. *Baldauf II*, 2007 WL 2156065, at *6.

d. In *Collins v. Hood*, No. 1:16-cv-00007-GHD-DAS, 2018 WL 1055526 (N.D. Miss. Feb. 26, 2018),

the plaintiff was pulled over for speeding and given a citation. *Id.* at *1. She questioned why she was being ticketed and after the citation was issued, told the officer she "would be calling his boss." *Id.* Although the officer initially ordered her to drive away, as she did so he ordered her to stop the vehicle, ordered her out of the vehicle, and ultimately arrested her. *Id.* The court denied the officer's motion to dismiss the plaintiff's retaliatory arrest claim, because once he had told her to drive away, the traffic stop had ended and he needed new probable cause to pull her over again. *Id.* at *5. The court also noted that the officer's contention that she called him a "'racist mother——'" as he was walking away was not sufficient grounds to arrest her. *Id.* at *6.

e. In *Laning v. Doyle*, No. 3:14-cv-24, 2015 WL 710427 (S.D. Ohio Feb. 18, 2015), a 63-year-old woman was directed to pull over in a strip mall parking lot for a traffic violation. *Id.* at *1. She did not immediately stop once the officer "activated the lights on his police cruiser"; instead, she kept driving through the parking lot and parked outside of her office. *Id.* After the plaintiff stepped out of her car, the defendant officer pointed his taser at her. *Id.* "[S]he asked why she was being detained," but he did not respond and instead forcefully arrested her, allegedly in retaliation for her question. *Id.* at *1, *14. On the way to the jail, the plaintiff alleged, the officer drove erratically—doing donuts in a parking lot—and verbally taunted her. *Id.* at *1. The court held that while it was not clearly established that the officer lacked probable cause to arrest the plaintiff for failing to comply with an officer based on her failure to immediately pull over, *id.* at *7–9, the allegations viewed in the light most favorable to her could sup-

port a finding that the officer retaliated against her for exercising her First Amendment right to "question[] why he had pulled her over," *id.* at *15.

f. In *Sebastian v. Ortiz*, No. 16-20501-CIV-MORENO, 2017 WL 4382010 (S.D. Fla. Sept. 29, 2017), the plaintiff was pulled over for speeding, but refused to grant the police permission to search his car. *Id.* at *2. The police then removed the plaintiff from the car and handcuffed him. *Id.* The plaintiff told the police that they could not search his car because they did not have a warrant. *Id.* One of the officers "responded by asking him if he was a 'YouTube lawyer' or 'constitutionalist' and that they 'didn't need a warrant.'" *Id.* After a search revealed a gun that the plaintiff was licensed to carry as a security guard employed by Miami-Dade County, he was charged with two counts of resisting or obstructing an officer without violence, and one count of reckless display of a firearm. *Id.* at *2–3. The charges were abandoned, but the plaintiff pled guilty to speeding. *Id.* at *3. Following his arrest, the plaintiff lost his job and was unable to find another one as an armed security guard. *Id.* When the plaintiff brought suit alleging that "he was arrested in retaliation for asserting his rights," the court dismissed the claim on qualified immunity grounds, solely on the basis that there was probable cause that the plaintiff had been speeding. *Id.* at *5–6.

4. First Amendment retaliatory arrest actions are not limited to the context of police confrontations. As Mr. Lozman's case last term and the examples below demonstrate, such arrests often target citizens for criticizing the government.

a. In *Lozman*, Mr. Lozman had long been an outspoken critic of the City of Riviera Beach's development policy. 138 S. Ct. at 1949. In addition to speaking against the policy at city council meetings, he filed a lawsuit against the city challenging some of the council's actions to advance that policy. *Id.* At one council meeting, a council member suggested that the city "intimidate" Mr. Lozman and other councilmembers "responded in the affirmative" when asked whether there was "a consensus on what [the first council member] is saying." *Id.* When Mr. Lozman appeared and began to speak at a subsequent council meeting, the councilmember who had suggested "intimidat[ing] Mr. Lozman ordered him to be arrested. *Id.* at 1949-50. This Court held that Mr. Lozman "need not prove the absence of probable cause to maintain a claim of retaliatory arrest against the City," and remanded to the Court of Appeals, where his case is still pending, to determine the proper next steps for Mr. Lozman's claim under the correct standard. *Id.* at 1955.

b. In *Roper v. City of New York*, No. 15 Civ. 8899 (PAE), 2017 WL 2483813 (S.D.N.Y. June 7, 2017), two photographers filed First Amendment retaliatory arrest claims after being arrested during a Black Lives Matter protest in Times Square. *Id.* at *1, *3. One plaintiff was arrested "for standing in the street" after being told by police "to move from the street to the sidewalk"—but he could not do so because police barricades and other officers were in the way. *Id.* at *1 (citing First Amended Complaint). The second plaintiff, a photojournalist, had crossed the street to find a restroom—but was arrested for disorderly conduct after he failed to use a crosswalk, even though police were blocking the crosswalks. *Id.* Because the

police had probable cause to arrest the "plaintiffs for violating . . . traffic rules" relating to sidewalk use, the plaintiffs' retaliatory arrest claims had to be dismissed under Second Circuit law, "even assuming that compliance with the . . . [police's] dispersal orders was not realistically possible." *Id.* at *3–5.

c. In *Morse v. San Francisco Bay Area Rapid Transit District (BART)*, No. 12-cv-5289 JSC, 2014 WL 572352 (N.D. Cal. Feb. 11, 2014), a journalist brought a retaliatory arrest claim after he was arrested by a Bay Area Rapid Transit ("BART") Deputy Police Chief while documenting a peaceful protest. *Id.* at *1. The plaintiff had a history of writing and publishing articles critical of the BART police, even "openly mock[ing] and ridicul[ing] the agency and its officers." *Id.* at *1–4, *9. By the time of the plaintiff's arrest, he was "'personally acquainted' with leaders of the BART organization," leading the police to, before the protest where the plaintiff was arrested, distribute flyers identifying him and give orders to arrest him if he "'incite[d] a riot or act[ed] in a criminal manner.'" *Id.* at *2, *4. Ultimately, the plaintiff was the sole member of the media arrested for standing in front of a fare gate—even though his conduct was indistinguishable from that of other journalists at the protest. *Id.* at *6–7, *9–10. Although the officer had probable cause to arrest the plaintiff for hindering the operation of a rail line, the district court, after identifying the ample evidence suggestive of defendants' retaliatory motive, denied the defendants' motion for summary judgment on the plaintiff's retaliatory arrest claim under Ninth Circuit law. *Id.* at *9–15.

d. In *Fernandes v. City of Jersey City*, Civ. No. 2:16-cv-07789-KM-JBC, 2017 WL 2799698 (D.N.J. June 27, 2017), a plaintiff brought a First Amendment retaliation claim after being forcibly removed from a City Council meeting at the mayor's request. *Id.* at *3, *9–11. A few months before that removal, the plaintiff and his wife obtained a construction permit and began to remodel their home. *Id.* at *2. But within days, City officials came onsite and ordered them to stop, "resulting in weather damage" to their home when they were unable to continue the project. *Id.* at *1–2. The plaintiff began attending City Council meetings and other public meetings to complain about the City's conduct. *Id.* at *3. At "one such meeting," the City Council President "accosted" the plaintiff; at another, the plaintiff was forcibly removed at the mayor's request even though, according to the plaintiff, he had not done anything to cause a disturbance. *Id.* The defendants argued that they did, in fact, have probable cause to remove him for causing a disturbance. *Id.* at *11. The court concluded that there was a genuine issue of material fact as to the existence of probable cause, and denied the defendant officers' motion to dismiss on qualified immunity grounds. *Id.* at *11, *15–16.

e. In *Galarnyk v. Fraser*, 687 F.3d 1070 (8th Cir. 2012), a bridge safety consultant criticized a government agency on a number of national news networks after a bridge collapsed in Minnesota, and later visited the collapse investigation command center to discuss his concerns with officials. *Id.* at 1071–72. After meeting with an official in one of the command center's trailers, he entered another trailer without permission and further criticized the government. *Id.* at 1072. He was asked to leave, and did. *Id.* But he

was stopped by a law enforcement officer after he had begun to leave the site, and was arrested shortly thereafter. *Id.* at 1073. Despite the plaintiff's allegations that the officer who stopped him repeatedly commented to a colleague that the plaintiff needed to be "locked up" for speaking out about the bridge collapse on national television, *id.*, the Eighth Circuit affirmed the dismissal of the safety consultant's claim on summary judgment because there was probable cause that he had trespassed, *id.* at 1076.

f. In *Ballentine v. Las Vegas Metropolitan Police Department*, No. 2:14-cv-01584-APG-GWF, 2017 WL 3610609 (D. Nev. Aug. 21, 2017), members of an activist group filed First Amendment retaliation claims after they were arrested for chalking anti-police messages on the sidewalks near a police station and a courthouse. *Id.* at *1–4, *6. Two officers had cited the plaintiffs, but encouraged them to protest in other ways, such as through holding signs. *Id.* at *2. The Court granted summary judgment in the officers' favor, in light of the lack of evidence of any retaliatory intent on their part in issuing the citations. *Id.* at *6. The court denied summary judgment, however, to a third officer who prepared the declaration of arrest for the plaintiffs. *Id.* Among other things, he included the chalked messages' anti-police content in his declaration ("f*** pigs" and "f*** the cops"), and when he had encountered the plaintiffs chalking, instead of telling them to stop, "he took pictures of their activities and challenged the content of their messages by disputing with the protestors the accuracy of their speech." *Id.* Even though the officer had reason to believe that there was probable cause that the plaintiffs had violated an anti-graffiti statute, *id.* at *1, *12, the court held that the retaliation claim survived

under Ninth Circuit law because "a reasonable jury could conclude that [the officer] intended to chill the plaintiffs' anti-police messages . . . and that he would not have sought the warrants but for the content of the plaintiffs' speech," *id.* at *6.

g. In *Abujayyab v. City of New York*, 15 Civ. 10080 (NRB), 2018 WL 3978122 (S.D.N.Y. Aug. 20, 2018), the plaintiff was punched in the face by a police officer and subsequently arrested in the course of participating nonviolently in a Black Lives Matter protest against police brutality. *Id.* at *1-2. The court dismissed his retaliatory arrest claim because, among other reasons, the officers had probable cause to arrest him for violating a New York traffic law which prohibits pedestrians from walking on a roadway when sidewalks are present, even when no traffic is present. *Id.* at *10-11.

Importantly, although each of these cases presents an example of officials using arrest in order to punish plaintiff's acts criticizing the government, this Court's decision in Mr. Lozman's case from last term would not necessarily prevent courts from dismissing cases like many of the above without probable cause. While the plaintiffs in these cases share with Mr. Lozman the fact that they were exercising their First Amendment right to criticize official conduct, they could not all necessarily demonstrate that (a) they were subjected to an official retaliatory policy, rather than an individual officer's retaliatory act; (b) they were not suing the arresting officer; and (c) their activity qualifies as petitioning activity. *See Lozman*, 138 S. Ct. at 1954-55.

B. Requiring A Plaintiff To Demonstrate The Absence Of Probable Cause Would Effectively Immunize Officials And Municipalities From Liability For Retaliatory Arrests.

1. The sheer number of minor infractions described above—carrying a shofar, failing to step onto a sidewalk, speeding, blocking a fare gate, entering a trailer, driving with tinted windows, or speaking at a city council meeting—demonstrates that many retaliatory arrests will likely be supported by probable cause that the arrestee committed some offense, however minor. Thus, contrary to Petitioners' suggestion that their proposed rule "might preclude . . . meritorious claims in rare instances," Pet. Br. 48, adopting a rule that the existence of probable cause bars the plaintiff's claim entirely will effectively immunize potentially retaliatory arrests from judicial scrutiny. The breadth of that immunity is confirmed by two additional, significant consequences of the Petitioners' proposed rule.

First, because probable cause is an objective inquiry, *see Devenpeck v. Alford*, 543 U.S. 146, 153 (2004), defendants can raise multiple theories of probable cause in the hope that the court accepts one, pointing to alleged infractions that were not even on the officer's mind, or communicated to the plaintiff, at the time of arrest. So in *Roper*, while the officers had originally arrested the plaintiffs for disorderly conduct at the Black Lives Matter protest, the court upheld the existence of "probable cause to arrest" them "for offenses relating to pedestrian traffic." 2017 WL 2483813, at *3–4. The court explained that "the relevant inquiry is 'whether probable cause existed to ar-

rest for *any* crime,' not necessarily for the crimes cited by the officers or ultimately charged." *Id.* at *3 (emphasis added) (quoting *Marcavage v. City of New York*, 689 F.3d 98, 109 (2d Cir. 2012)). And so the existence of probable cause that the plaintiffs had "violat[ed] . . . traffic rules" precluded their claim as a matter of law. *Id.* at *3–4.

The instant case serves as a prime example of the troubling consequences of allowing probable cause to be a moving target. Respondent was arrested for and charged with disorderly conduct and resisting arrest (charges that were subsequently dropped). *See* J.A. 10, J.A. 20-21, J.A. 24-25, J.A. 245. But the district court found that the officers had probable cause to arrest him for "harassment," despite that charge appearing nowhere in the contemporaneous records of his arrest. *Compare* J.A. 17 (contemporaneous arrest report of Petitioner Nieves stating "I... advised [Respondent] that he was under arrest for disorderly conduct.") *with* J.A. 142 (declaration of Petitioner Nieves in support of summary judgment motion stating "I informed [Respondent] that he was going to jail for harassing an officer.").[8]

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[8] That Petitioners relied on harassment as the offense for which they have probable cause underscores the problems with Petitioners' proposed rule discussed *supra* at 9-15: That offense can be satisfied by "taunt[ing] or challeng[ing] another person"—in other words, challenging the authority of a police officer—"in a manner likely to provoke an immediate violent response." AS 11.61.120(a)(1). The district court found this second element met by the officers' "violent[]" acts arresting Mr. Bartlett. 2016 WL 3702952 at *5. In short, at least under the rationale of the district court, one could *never* make out a claim for retaliatory arrest against a police officer in Alaska if one's speech "challenge[d]" the officer and the *officer* responded aggressively.

Mr. Lozman's case last term presented a disturbingly similar pattern. A few months after Mr. Lozman filed a lawsuit against the City of Riviera Beach alleging the violation of government transparency laws, Mr. Lozman tried to speak at a City Council meeting. When he did so, a Councilmember who had previously stated a desire to "intimidate" Mr. Lozman in response to the lawsuit ordered his arrest. *Lozman*, 138 S. Ct. at 1949-50.

Like Respondent here, Mr. Lozman was charged with disorderly conduct and resisting arrest.[9] *Id.* at 1950. But just as the district court did here, the lower courts in Mr. Lozman's case relied on the finding that probable cause existed for a wholly separate offense in order to support a judgment against Mr. Lozman on his retaliatory arrest claim. Initially, the district court determined that, as a matter of law, there was no probable cause as to *either* offense. *See* Joint Appendix, *Lozman v. City of Riviera Beach,* No. 17-21, at J.A. 108 (S. Ct. Dec. 22, 2017). So the city switched gears *during trial*, at the district court's encouragement, alleging probable cause for two additional offenses that had not been raised up to that point, one of which was disturbance of a lawful assembly. *See id.* at J.A. 108-121; J.A. 131-134. The Eleventh Circuit accepted that the existence of probable cause as to the newly identified offense of disturbance of a lawful assembly meant that Mr. Lozman's retaliatory arrest claim failed as a matter of law. *Lozman v. City of Riviera Beach*, 681 F. App'x 746, 750-752 (11th Cir. 2017). In both this case and Mr. Lozman's, therefore, the defendants were able to

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[9] Also as in the instant case, the prosecutor in Mr. Lozman's case never pursued the charges. 138 S. Ct. at 1950.

defeat the plaintiff's claim by testing theories of probable cause until they hit on one that stuck.

Second, the Petitioners' "no probable cause" rule bars First Amendment retaliatory arrest claims in the face of probable cause even where there is strong evidence of a retaliatory motive. In other contexts, however, this Court has recognized that the touchstone of the First Amendment retaliation inquiry is the government's motive: "the government's reason for [taking adverse action] is what counts." *Heffernan*, 136 S. Ct. at 1418. That is because the government inflicts the relevant "constitutional harm"—discouraging citizens from engaging in protected speech—whenever it acts because of retaliatory animus. *Id.* at 1419.

Yet the "no probable cause" rule renders irrelevant evidence of retaliatory intent, no matter how overwhelming. In this case, the court of appeals concluded that Respondent had sufficiently alleged that Petitioners acted with retaliatory intent, based on respondent's assertion that Sergeant Nieves said "bet you wish you would have talked to me now" after his arrest. Pet. App. 6. And in Mr. Lozman's case, his arrest was just one event in a longer string of reprisals committed by the City pursuant to a councilmember's stated desire to "intimidate" him because of his lawsuit against the City. *Lozman*, 138 S. Ct. at 1949. Yet even though the Eleventh Circuit concluded that Mr. Lozman "seems to have established a sufficient causal nexus between [the councilmember] and the alleged constitutional injury of his arrest," it held that the existence of probable cause rendered that conclusion irrelevant. *Lozman*, 681 F. App'x at 752. Although this Court held that the specific circum-

stances of Mr. Lozman's case did not require him to make a showing of probable cause to prevail on his retaliatory arrest claim, plaintiffs in other contexts making equally strong showings of retaliatory intent would still be barred from recovery under Petitioners' proposed rule.

Similarly, the *Roper* plaintiffs could not pursue a retaliatory arrest claim even though one plaintiff, before he was arrested at the Black Lives Matter protest, "heard an NYPD supervisor instruct his officers to '[j]ust take somebody and put them in handcuffs.'" 2017 WL 2483813, at *1 (alteration in original). Galarnyk, the plaintiff bridge consultant, could not survive summary judgment on his retaliatory arrest claim despite the fact that one officer asserted repeatedly that Galarnyk needed to be "locked up" for sharing his views about the bridge collapse on national television. *Galarnyk*, 687 F.3d at 1073. And Baldauf, the plaintiff involved in a confrontation with a small-town police officer could not withstand summary judgment on her retaliatory arrest claim, even though the officer had told her following the confrontation that he was not going to arrest her, but changed course after she threatened to—and did—report the officer to the police chief. *Baldauf II*, 2007 WL 2156065, at *1, *4; *Baldauf I*, 2007 WL 1202911, at *1.

Because journalist Morse was arrested in California, his First Amendment retaliatory arrest claim against the BART Police could proceed despite the existence of probable cause for interfering with a rail line. *Morse*, 2014 WL 572352, at *11–15. But if he had been arrested in Florida instead—where Mr. Lozman was arrested last year and where the Elev-

enth Circuit has adopted Petitioners' "no probable cause" rule—his claim would have failed as a matter of law—notwithstanding Morse's presentation of evidence that BART police officers knew of inflammatory articles he had written about them; had circulated flyers with an image of his face prior to the protest; and preemptively ordered his arrest if he did anything criminal. *Id.* at *3–4.

2. The more nuanced rule advocated by Respondent would avoid effectively immunizing retaliatory arrests, while giving factfinders the ability to distinguish between legitimate law enforcement activities and improper retaliation. Under the *Mt. Healthy* framework, the existence of probable cause would still be relevant evidence of the defendant's lack of retaliatory intent. *See* Resp. Br. 38-39, 50-52. But the existence of probable cause, without more, would not categorically bar a plaintiff who is able to establish that she was in fact arrested in retaliation for her speech from seeking redress for that constitutional injury.

For instance, imagine that a police officer pulled over a driver for the stated reason that the car displayed a political bumper sticker that the officer found offensive. Upon checking the driver's information, the officer realized that the driver was subject to an outstanding felony warrant, and arrested her. If the driver subsequently brought a retaliatory arrest claim, the police officer would prevail under the *Mt. Healthy* framework (despite the direct evidence of retaliatory intent), because he would be readily able to demonstrate that he would have arrested the driver even in the absence of retaliatory animus. *See* Resp. Br. 38, 51-52; *Mt. Healthy*, 429

U.S. at 287. If, however, the driver is able to establish that the outstanding warrant was one for which she ordinarily would not have been arrested (for instance, because it had been automatically issued for a minor offense such as failure to appear), the outcome might be different. In that situation, the warrant would not establish that the officer would have made the arrest in the absence of retaliatory intent. *See* Resp. Br. 39.

The *Mt. Healthy* framework thus permits factfinders to consider probable cause, and to conclude based on the nature of that probable cause, as well as the surrounding circumstances, that the arrest should not give rise to liability because it reflected legitimate law enforcement concerns—even if retaliatory animus played some role in the encounter. But where the existence of probable cause does not rebut the inference that the arrest was driven by retaliatory intent rather than law enforcement objectives, Respondent's approach enables the factfinder to hold the defendant liable. Doing so in that circumstance furthers First Amendment values without undermining legitimate government interests.

This balancing will be easier as more and more police departments use body cameras to record their officers and as members of the public increasingly have cellular phones able to record video of arrests. Indeed, increased availability of video of arrests will, in general, reduce the "causation problem" that concerned the Court in Mr. Lozman's case, i.e., that there can be difficulty determining the connection between the defendant's alleged animus and plaintiff's injury. 138 S. Ct. 1954; *see id.* at 1953. As the Court acknowledged—contrary to Petitioners' central ar-

gument here, see Pet. Br. 13-14—this problem is less of an issue in the retaliatory arrest context than in the retaliatory prosecution context. *Lozman*, 138 S. Ct. at 1953 (noting that "in retaliatory prosecution cases, the causal connection between the defendant's animus and the prosecutor's decision to prosecute is weakened by the 'presumption of regularity accorded to prosecutorial decisionmaking'" but that this "presumption does not apply in [the retaliatory arrest] context"). While video may not capture all the relevant evidence of motive, it will undoubtedly capture significant evidence in many cases, enabling courts and juries to evaluate the connection for themselves. *See, e.g.*, Alberto R. Gonzales & Donald Q. Cochran, *Police-Worn Body Cameras: An Antidote to the "Ferguson Effect"?*, 82 Mo. L. Rev 299, 311 (Spring 2017) ("Police-worn body cameras contribute to a sense of fairness and justice when they assist in resolving what would otherwise be suspect officer-citizen encounters by creating an 'objective and reviewable record.'"). By contrast, under Petitioners' "no probable cause" rule, increased availability of video recordings of arrests can be expected to produce more cases in which documented police retaliation is nonetheless immunized from suit, running the risk of increasing public unrest and frustration at perceived injustices.

3. By contrast, the consequence of permitting the existence of probable cause of any infraction to categorically bar First Amendment retaliatory arrest claims would be to give officials a blank check to use such arrests to punish disfavored speech. Given that officials would rarely, if ever, face liability for retaliatory arrests, such arrests could become an attractive means of punishing or deterring criticism of the government.

That danger would be exacerbated by the relative ease with which officials may order or undertake an arrest. As in Mr. Lozman's case, for example, a single official may order or execute an on-the-spot arrest of an individual who is engaging in speech. In that respect, retaliatory arrests are a much more readily available means of punishing speech than retaliatory prosecutions. As the Court explained in *Hartman*, to institute a retaliatory prosecution, an official with retaliatory animus must persuade the prosecutor to institute criminal process and to devote state resources to the prosecution. 547 U.S. at 261–64. Thus, *Hartman*'s holding that the plaintiff in a retaliatory prosecution case must establish the lack of probable cause does not give officials a particularly attractive means of retaliating against disfavored speech: prosecutions remain a cumbersome and costly mechanism for doing so. In the arrest context, however, applying *Hartman*'s "no probable cause" requirement would effectively insulate from liability the use of a readily available means of punishing speech.

C. Adopting Petitioners' Proposed "No Probable Cause" Requirement Would Chill The Exercise Of First Amendment Rights.

It is beyond dispute that the threat of being arrested for engaging in protected speech will deter First Amendment activities. Indeed, the very reason that "[o]fficial reprisal for protected speech" is prohibited is because "it threatens to inhibit exercise of the protected right." *Hartman*, 547 U.S. at 256 (quoting *Crawford-El*, 523 U.S. at 588 n.10); *Ford v. City of Yakima*, 706 F.3d 1188, 1194 (9th Cir. 2013) ("[A] person of ordinary firmness would be chilled from fu-

ture exercise of his First Amendment rights if he were booked and taken to jail in retaliation for his speech."). And such chilling extends beyond the target of government reprisal; retaliation against one individual "tells the others that they engage in protected activity at their peril." *Heffernan*, 136 S. Ct. at 1419.

An individual's ability to bring a First Amendment retaliatory arrest claim against vindictive government officials serves as an important check on such reprisal and the resultant chilling of protected activity. *See generally Morse*, 2014 WL 572352 (plaintiff journalist's claim for retaliatory arrest by BART police could move forward); *Ballentine v. Las Vegas Metro. Police Dep't*, 2017 WL 3610609 (plaintiff protestors' claim against officer who prepared declaration of arrest could move forward based on the officer's fixation on the content of the plaintiffs' messages); *see also Naveed v. City of San Jose*, No. 15-cv-05298-PSG, 2016 WL 2957147, at *1, *5–6 (N.D. Cal. May 23, 2016) (permitting First Amendment retaliatory arrest claim to proceed, despite the existence of probable cause to support the arrest, where the plaintiffs were arrested after attempting to film the police; and concluding that defendant officers' alleged "conduct would chill a person of ordinary firmness from future First Amendment activity"). Such suits help deter retaliatory conduct, making it less likely to happen in the future. And from the plaintiff's perspective, an after-the-fact damages suit is generally the only means she has to vindicate her rights after a retaliatory arrest.

But in jurisdictions where probable cause bars a First Amendment retaliatory arrest claim as a matter

of law, this check is effectively absent. Without the ability to pursue litigation against officials who have targeted them for their speech, citizens around the country could very well conclude that the danger of being arrested (and being taken to the police station, booked, and jailed) is simply too high a price to pay for the privilege of commenting on government policies, protesting the justification for their arrest, intervening to protect other citizens from what is perceived as inappropriate or unlawful police activity, or otherwise engaging in protected activity. *See, e.g.*, *Sebastian*, 2017 WL 4382010, at *2–3 (recounting that, after the police arrested the plaintiff, who worked as a security guard for Miami-Dade Transit, the police told him that "he would never return to his job with Miami-Dade County"; the plaintiff was, indeed, terminated from his job following the arrest). That chilling effect is precisely what the First Amendment guards against.

This risk of self-censoring is particularly acute in interactions between individuals and their local governments—especially in smaller cities and towns and in other small, isolated community environments like in the instant case. In smaller towns and communities, citizens are much likelier to interact with government officials or individual police officers on a regular basis. Government critics and dissenters are more likely to be known to officials, and officials are more likely to have relationships with one another such that it is less likely for there to be any "neutral" officials to which an individual targeted for retaliation can appeal. It is no coincidence that, in a number of the examples discussed above, the retaliatory arrests at issue were effected by local government officials in smaller cities and towns. *See, e.g.*, Public

Data, Google, goo.gl/dh55sP (last visited Oct. 3, 2018) (Riviera Beach, Florida, where Mr. Lozman was arrested in retaliation for his speech activity, has a population of 34,674; Pittsboro, Indiana, where plaintiff Baldauf got into an altercation with a police officer in a convenience store, has a population of 3,375; Huber Heights, Ohio, where 63-year-old plaintiff Laning was pulled over, arrested, and forced to ride in a police car while the officer did "donuts," has a population of 37,986); *see also* Pet. Br. at 2-3 ("upwards of 10,000 people gathering at "multi-day" Arctic Man festival). The greater degree of interaction between citizens of smaller towns and their local governments and closer relationships between government officials in those areas give rise to both increased opportunities for retaliation and more severe chill when retaliation occurs.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Respondent's brief, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

GINGER D. ANDERS
Counsel of Record
CHRISTOPHER M. LYNCH
MUNGER, TOLLES & OLSON LLP
1155 F Street NW,
7th Floor
Washington, DC 20004
(202) 220-1107
ginger.anders@mto.com

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Supreme Court of the United States

LUIS A. NIEVES, *et al.*,

Petitioners,

—v.—

RUSSELL P. BARTLETT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* INSTITUTE FOR FREE SPEECH IN SUPPORT OF RESPONDENT

ALLEN DICKERSON
INSTITUTE FOR FREE SPEECH
124 South West Street,
Suite 201
Alexandria, Virginia 22314
(703) 894-6800
adickerson@ifs.org

FLOYD ABRAMS
Counsel of Record
KATHLEEN E. FARLEY
BENJAMIN A. TAYLOR
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, New York 10005
(212) 701-3000
fabrams@cahill.com

Attorneys for Amicus Curiae
Institute for Free Speech

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization that exists to protect and defend the First Amendment rights of speech, press, assembly, and petition. As part of that mission, the Institute represents individuals and civil society organizations *pro bono* in cases raising First Amendment objections to the regulation of protected speech. The Institute has an interest in this case because arrests made in retaliation for the exercise of First Amendment rights are a particularly chilling form of governmental response to constitutionally protected speech disfavored by government officials. It would imperil First Amendment interests of the most significant nature if such misconduct by an agent of the government were immunized from judicial scrutiny, no matter how egregious the circumstances, whenever probable cause of a violation of law may be said to have existed.

To avoid that result and to vindicate First Amendment principles of the highest order, the Institute for Free Speech submits this brief in support of respondent Russell Bartlett and urges the court to affirm the decision below and answer the Question Presented in the negative. That an arrest effected at the discretion of an individual acting on behalf of the state was supported by probable cause

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[1] Pursuant to Sup. Ct. Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Pursuant to Sup. Ct. Rule 37.2(a), all parties have provided blanket consent to the filing of amicus curiae briefs, which the Clerk of the Court has noted on the docket.

should not, in and of itself, bar a First Amendment retaliatory arrest claim under 42 U.S.C. § 1983.

INTRODUCTION: *MOUNT HEALTHY* AND ITS PROGENY

Earlier this year, when this Court decided a strikingly similar case concerning a claim of retaliatory arrest effected pursuant to an official municipal policy, it directed the Eleventh Circuit to analyze the claim pursuant to the framework established in *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) that it has long used to address claims of government retaliation in violation of First Amendment rights. *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1955 (2018). In *Mount Healthy*, the Court determined that to state a claim for First Amendment retaliation, a plaintiff must show that: (1) her speech was constitutionally protected; (2) she suffered adverse conduct that would likely deter a person of ordinary firmness from engaging in such speech; and (3) in part, plaintiff's constitutionally protected activity motivated defendant's adverse action. 429 U.S. at 285-287.

The *Mount Healthy* analysis often focuses on the third factor, which addresses the issue of motivation. Once the plaintiff shows that her protected conduct was a motivating factor triggering the defendant's adverse conduct, the burden shifts to the defendant to show that it would have taken the same action in the absence of the protected conduct, in which case the defendant cannot be held liable. *Id.* at 287. Defendants cann t simply contend that the adverse action was justified by circumstances other than retaliatory motive—they must show that this other

justification *actually motivated* the adverse action. Indeed, a government act taken in retaliation for the exercise of First Amendment rights is actionable under § 1983 even if the act, when taken for a different reason, might have been proper. That is what this Court held in *Mount Healthy*, and also in the recent *Lozman* case in the context of a retaliatory arrest effected pursuant to an official municipal policy. The same rule should apply when a member of the police arrests someone who would not otherwise have been arrested but for the policeman's decision to retaliate against protected speech.

To be clear, application of *Mount Healthy* in a retaliatory arrest case neither requires nor permits lower courts to ignore the issue of probable cause. Under *Mount Healthy*, a court analyzing a claim of retaliatory arrest must consider whether the arrest would have occurred absent the protected speech. The presence of probable cause is necessary to show the arrest would have occurred irrespective of the speech, but, because police officers are empowered with significant discretion in deciding who and when to arrest, its existence alone does not preclude a retaliatory arrest claim. In those circumstances where plaintiffs can demonstrate that the but-for cause of the arrest was the desire to retaliate against plaintiff's protected speech, an action under § 1983 may proceed.

In this case, petitioners urge the Court to create an exception to *Mount Healthy* in cases involving arrests at the discretion of an individual police officer or another government official. In support of their argument, they point to *Hartman v. Moore*, 547 U.S. 250 (2006), where the Court set forth, in the context of retaliatory prosecution claims, the only exception to *Mount Healthy* made to date. Under *Hartman*,

when retaliatory prosecution claims are at issue, courts must make a threshold determination that the prosecution proceeded despite the absence of probable cause for the offense. *See id.* Only after finding absence of probable cause does the court return to the *Mount Healthy*-like analysis. *Id.* at 265-66.

The *Hartman* exception, however, is only necessary to resolve the "distinct problem of causation" present in evaluating retaliatory prosecution claims that is not present in other *Mount Healthy* cases. *Id.* at 263. The causation problem there identified by this Court is that a plaintiff bringing a retaliatory prosecution claim necessarily "must show that the nonprosecuting official acted in retaliation, and must also show that he induced the prosecutor to bring charges that would not have been initiated without his urging." *Id.* at 262. By its nature, such a showing is exceedingly difficult to make because "the longstanding presumption of regularity accorded to prosecutorial decisionmaking," *id.* at 263, makes the prosecutor's mind a black box—the court may not inquire into the subjective motivation of the prosecutor who brought the charges. As a result, so long as probable cause for the prosecution exists, the underlying motivation of the state in commencing the prosecution may not be challenged without intruding into long-protected decisionmaking areas.

In cases involving retaliatory arrests, there is no such "legal obstacle," as the Court in *Hartman* put it, to deciding whether police who arrest people for any of the multitudes of potential offenses did so with the motivation of suppressing or punishing constitutionally protected speech. Indeed, this Court has previously analyzed a police officer's motivation to arrest and found it to be retaliatory. *Norwell v. City of Cincinnati, Ohio*, 414 U.S. 14, 16 (1973) (reversing

disorderly conduct conviction because the Court was "convinced that petitioner was arrested and convicted merely because he verbally and negatively protested Officer Johnson's treatment of him.").

The core legal issue in this case is thus whether this Court should create a second exception to the *Mount Healthy* standard specifically with respect to arrests. We think not. Unlike a retaliatory prosecution claim, a retaliatory arrest claim may be examined using the classic *Mount Healthy* framework because, unlike the *Hartman* situation, a court is permitted to fully examine the motivation of police officers and any other government officials involved in the decision to arrest. Just as a court can examine the motive behind an arrest effected pursuant to an official municipal policy, *see Lozman*, 138 S. Ct. at 1955, so too can it examine the motive behind other arrests. While application of *Mount Healthy* obviously does not and should not guarantee the success of a plaintiff alleging unconstitutional retaliation, application of *Hartman* assures its failure in any situation in which probable cause is held to exist. That is not a result consistent with the First Amendment.

ARGUMENT

I. SIGNIFICANT DEPRIVATIONS OF FIRST AMENDMENT RIGHTS WILL OCCUR IF THE EXISTENCE OF PROBABLE CAUSE FOR AN ARREST BARS ALL RETALIATORY ARREST CLAIMS UNDER ALL CIRCUMSTANCES

If this Court were to create a new exception to *Mount Healthy* which barred retaliatory arrest claims in cases in which probable cause can be demonstrated, people could be arrested in retaliation for criticizing

the police or offending them for any reason, including their expression of political views not shared by a particular police officer. In a nation awash with criminal statutes that are enforced with varying degrees of regularity—and thus often generally unenforced—it is not difficult to find probable cause to arrest. For example, the case at hand arose in Alaska, a state that regulates alcohol so strictly that it is illegal to be intoxicated inside a bar or any other establishment licensed to sell liquor. AS § 04.16.040 ("A drunken person may not knowingly enter or remain on premises licensed under this title."). This statute is routinely violated, but police retain the discretion to enforce it, and have stated to the press that they do so selectively.[2] It is not difficult to imagine a plainclothes policeman who cannot feasibly arrest every intoxicated person on the premises being drawn to target a patron loudly proclaiming political views with which the officer vehemently disagrees.

Petitioners acknowledge, as they must, that their framework "might preclude recovery for meritorious claims." Pet Br. at 48. Notwithstanding their acknowledgement of the risk, articulated by this Court in *Lozman*, that "some police officers may exploit the arrest power as a means of suppressing speech," Pet Br. at 49 (quoting *Lozman*, 138 S. Ct. at 1953),[3] they maintain that the likelihood that officers

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[2] Christina Ng, *Alaska Cops Arresting Drunks in Bars*, ABC NEWS (Jan. 10, 2012), https://abcnews.go.com/US/illegal-drunk-alaska-bars-law/story?id=15330748 (describing a 2012 effort to start enforcing this statute by plainclothes policemen, who ignored individuals they determined were only mildly intoxicated, and focused on arresting individuals they believed were extremely drunk.).

[3] This Court cited the Institute's *amicus* brief for that proposition. *Lozman*, 138 S. Ct. at 1953.

will actually suppress speech is minimal in practice, and that the speech suppressed is not terribly important. Pet Br. at 51-52. These contentions simply overlook numerous non-hypothetical scenarios memorialized in court cases and news reports. We set forth below the facts of four recent cases—one from a court of appeals and three from federal district courts—which demonstrate how outspoken people are routinely arrested in retaliation for their protected speech, and illustrate the magnitude of the speech-destructive impact of the rule sought by petitioners. Were this Court to remove a check on unlimited police discretion to arrest by imposing a bar on retaliatory arrest claims made any time probable cause of a violation of law could be said to have existed, there is no reason to expect that such cases would be infrequent.

Consider, for example, the following: on October 24, 2016, Brett Mauthe entered a polling location in New Braunfels, Texas. Mauthe was told to remove a hat bearing a Trump campaign slogan, and to turn inside out his t-shirt reading "Basket of Deplorables" to comply with an electioneering statute. Mauthe agreed to remove the hat, but declined to turn his shirt inside out. He was arrested. The county elections coordinator told the press that in her two decades working at the county election office she had never seen a potential voter arrested on such a charge. [4] Furthermore, a GOP chairman in a nearby county told the press that poll-watchers in relatively liberal San Antonio had seen voters wearing Trump shirts

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[4] John MacCormack, *Texas man arrested after wearing Trump hat, shirt to vote*, THE HOUSTON CHRONICLE (Oct. 27, 2016), https://www.chron.com/news/local/article/Electioneering-violation-leads-to-arrest-10418085.php.

told to turn them inside-out while voters wearing shirts supporting Hillary Clinton were not. *Id.*

Under the legal test urged by petitioners, even armed with evidence that a police officer patrolling a particular early-voting location had arrested all persons wearing Trump shirts who refused to turn them inside out, but let people wearing Hillary-emblazoned shirts to remain within the 100 foot radius in which electioneering is prohibited, no person arrested could state a claim for retaliatory arrest. Indeed, that would be true even if the officer had unambiguously said to the would-be Trump voters that he was arresting them because of their Trump-supporting apparel.

Any such retaliation based on the voters' political and social views would be flatly inconsistent with the core of the First Amendment. The four cases described below—three that were permitted to proceed despite the presence of probable cause and one that was not—illustrate the accuracy of this proposition.

A. *Greene v. Barber*, 310 F.3d 889, 892 (6th Cir. 2002)

In *Greene v. Barber*, 310 F.3d 889 (6th Cir. 2002), plaintiff Anthony Greene visited the Grand Rapids Police Department to seek return of his car after it had been towed from a no-parking zone. *Id.*at 892. In a raised voice, Mr. Greene objected to paying storage fees for the period before he received notification his car was in storage. *Id.* Mr. Greene was referred to Lieutenant Jack Barber, who informed him the charge was standard procedure; Mr. Greene replied by telling the lieutenant he was "really being [an] asshole." *Id.* The following conversation transpired:

> Lt. Barber: "You can't talk to me like that in my building."
>
> Mr. Greene: "What do you mean I can't talk to you like this in your building? . I'm exercising my freedom of speech. This is the United States of America and we have freedom of speech here and if you don't like it you should move to another country."
>
> Lt. Barber: "Well, not in my building."
>
> Mr. Greene: "Well, if that's how you feel you're really stupid."
>
> Lt. Barber: "You're under arrest."

Id. at 892-93.

Mr. Greene was pepper sprayed and violently placed under arrest. *Id.* at 893. He was charged with creating a disturbance in violation of a local ordinance, and with hindering and opposing a police officer, for which he was ultimately acquitted. *Id.* Mr. Greene brought a civil rights action alleging, *inter alia*, retaliatory arrest in violation of his First Amendment rights. *Id.*

The Court of Appeals found that even though a "respectable argument" could be made that there was probable cause to believe that Mr. Greene was engaging in a disturbance in a public place in violation of the municipal statute, that did not foreclose a violation of Mr. Green's First Amendment rights, as a permissible act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983. *Id.* 895-96. Further, the court reasoned, Mr. Greene's words were protected speech, as they could not reasonably be expected to incite a breach of the peace, especially "by a police

officer whose sworn duty it was to uphold the law." *Id.* The court applied the *Mount Healthy* framework and held that questions of fact as to whether Lt. Barber would have taken the same action in the absence of Mr. Green's protected speech precluded dismissal of the retaliation claim on summary judgment. *Id.* at 897-98.

B. *Gullick v. Ott*, 517 F. Supp. 2d 1063 (W.D. Wis. 2007)

In *Gullick* v. *Ott*, 517 F. Supp. 2d 1063 (W.D. Wis. 2007), Thomas Gullick sued deputy sheriff Terry Ott in his individual capacity for issuing a citation in retaliation for Ott's supporting a particular political candidate. Gullick was well-known as a supporter of town-sheriff candidate Richard Bradner, and was "disliked by supporters of" Bradner's opponent, Dennis Richards. *Id* at 1065. Ott, on the other hand, was an avid supporter of Richards. *Id.* In fact, Ott's support was so intense that even before the incident giving rise to this case, another officer had warned Gullick to "look out for" Ott. *Id.* at 1066. In the course of his warning, the officer predicted that Ott would treat Gullick unfairly were the two to ever have a dispute, because of their opposing political views. *Id.*

The interaction giving rise to the suit began when Ott saw Gullick standing on the side of the road near a sign that read: "Richards for Sheriff." *Id.* Ott pulled off to the side of the road, approached Gullick, and asked him why he was near the sign. *Id.* Gullick maintained he said that he was examining the sign to see whether it had been placed illegally on a public right of way; according to Ott, Gullick responded that he went near the sign to urinate. *Id.*

Shortly thereafter, Ott told Gullick to wait in his car while he took a look around. *Id.* Ott surveyed the area, and then contacted the sheriff's dispatch center to discuss the situation. *Id.* Ott identified Gullick to the dispatcher, and then described what he had seen. *Id.* In that description Ott noted that the "Richards for Sheriff" sign was "bent over onto the ground." Ott's supervisor visited the scene later that night and found no such damage to the sign. *Id.*

With Gullick still waiting in his car, Ott started text-message conversations with two other officers. In one of the conversations, the other officer wrote that Gullick was "a political fanatic," and that Ott should call him. *Id.* at 1067. Ott responded that he could not make the call, but that he was in search of the statute on public urination. *Id.* In the other conversation, the other officer asked whether Ott thought Gullick was the person responsible for the anti-Richards fliers that were placed around town.[5] *Id.*

After his conversation, Ott returned to Gullick, issued a citation for public urination, and asked whether he could search his car for anti-Richards fliers.[6] *Id.* Gullick consented, and Ott searched Gullick's car to no avail. *Id.* The stop lasted a little over one hour. *Id.*

In accordance with the *Mount Healthy* framework, the court analyzed the absence of probable cause as

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[5] While the stop was ongoing, Richards called his campaign manager to tell him that Gullick had been caught "peeing on a sign or bending a sign." The manager responded that "they finally caught" Gullick. *Id.*

[6] In his police report, Ott wrote that he had searched Gullick's car for anti-Richards fliers in pursuit of "evidence to support [his] case of criminal damage to a political sign." *Id.*

one factor in its larger inquiry into whether the arrest was motivated by retaliatory animus. The court found that the parties' diametrically opposing viewpoints, the ominous warning to Gullick, the infrequency with which public-urination statutes are enforced (especially in rural areas), the dispute of fact as to the absence of probable cause, and the groundless search of Gullick's car all suggested that the factor driving Ott's decision to give Gullick a citation was actually Gullick's support of Bradner. *Id.* Summary judgment was thus denied to deputy sheriff Ott.

C. *Henneberry v. City of Newark*, 2017 WL 1493006 (N.D. Cal. April 26, 2017)

Henneberry v. City of Newark, 2017 WL 1493006 (N.D. Cal. April 26, 2017) concerned John Henneberry, who frequently attended City Council meetings and "actively participated in Newark politics," criticizing the salaries of City officials and their decisions to cut back public services. *Id.* at *1. Newark City officials and police officers were familiar with Mr. Henneberry because of his frequent participation at meetings, and found his criticism and use of profanity to be "hurtful." *Id.*

Mr. Hennberry saw advertisements about an upcoming State of the City address, and found further information about the event online on the "Community Events" page of the City of Newark Chamber of Commerce website. *Id.* The event description and linked flyer indicated that the event would be held at a Hilton hotel and that portions of the event, including a luncheon, required a paid ticket. *Id.* It also stated that free seating would be available for those who did not attend the lunch. *Id.* The event description and flyer did not indicate that

the event was private, nor did they indicate reservations were required to sit in the gallery seating. *Id.* Although defendants contended on summary judgment that the event was private and reservations were required, the court determined the question was "at the very least ambiguous." *Id.* at *10.

When Mr. Henneberry arrived at the State of the City address, he sat in the gallery section seating wearing a nametag he filled out at an unstaffed table. *Id.*at *2. Mr. Henneberry did not speak, but took notes on a pad of paper. *Id.*

Defendant Newark City Manager John Becker observed plaintiff was present and, worried about Plaintiff "embarrassing the Mayor," asked Newark Chamber of Commerce President Linda Ashley if there was "some reason why [Plaintiff] shouldn't be here." *Id.* Ashley responded that "we don't let anybody in who doesn't have a reservation" and "told Becker words to the effect that she would get Becker to leave because he did not have a reservation." *Id.*. Ashley approached the gallery, inquired of those seated there for the first time if they had reservations, and then informed Mr. Henneberry he needed to leave because he did not have a reservation. *Id.* at *2, *10. Mr. Henneberry declined to leave, citing a California law that requires meetings of local government bodies to be open to the public. *Id.* at *2. The Newark Police Commander and a plainclothes officer joined the discussion, and Mr. Henneberry continued to refuse to depart. Mr. Henneberry did not use inappropriate language during this confrontation, nor was he loud, confrontational, or abusive. *Id.*

Two uniformed police officers physically removed Mr. Henneberry from the event. After confirming with the police commander, Defendant Officer Fredstrom handcuffed Mr. Henneberry and placed him into a patrol car. *Id.* at *3. After conducting an investigation, Officer Fredstrom concluded that he had probable cause to arrest Mr. Henneberry for trespass. *Id.* at *3.

The court, applying Ninth Circuit precedent, determined that while there was probable cause to arrest plaintiff, First Amendment retaliation claims against Becker and Officer Fredstrom could proceed to trial. *Id.* at *10-*11. The court noted that a reasonable trier of fact could conclude Becker triggered plaintiff's removal to prevent him from engaging in the type of speech he had previously engaged in at City Council meetings. *Id.* The court further concluded that Officer Fredstrom's decision to arrest Mr. Henneberry for trespassing instead of citing and releasing him, could allow a reasonable trier of fact to determine the arrest was in retaliation for his prior protected speech at City Council meetings. *Id.* at *12.

D. *Cranford v. Kluttz*, 278 F. Supp. 3d 848 (M.D.N.C. 2017)

In *Cranford v. Kluttz*, 278 F. Supp. 3d 848 (M.D.N.C. 2017), plaintiff Brian D. Cranford, a Christian "street preacher" who traveled his local area professing his interpretation of the Bible on public streets, began preaching at the "Farmers Day Festival," a street fair featuring a farmer's market and other local vendors. *Id.* at 853. Local police Chief Eddie Kluttz reassigned Detective Reese Helms from general patrol duty and instructed him to observe Cranford, telling Detective Helms that "if

[plaintiff] violates any law, he should be arrested." Excerpts of Dep. of Reese Helms at 17, 20, *Cranford* v. *Kluttz*, No. 15-cv-00987 (M.D.N.C., Dec. 1, 2016), ECF No. 31-3. When Detective Helms told Cranford he could not preach on Festival grounds or pass out literature inside festival grounds because he had not registered for a vendor booth, Cranford stood near the boundary of the festival grounds, and preached to passersby, focusing on the topic that women who did not dress modestly were "whores and prostitutes." *Id.* at 853-854.

After Cranford's preaching precipitated a "contentious" conversation with a specific festivalgoer, Detective Helms approached Cranford and told him, "[y]ou're not gonna be disrespectful" and "don't start causing issue with the people. You can preach, but that has nothing to do with talking about people." *Id.* at 854. Detective Helms' instructions were evidently based on the North Carolina state statute prohibiting "[d]isorderly conduct," which included causing a public disturbance by "[m]ak[ing] or us[ing] any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation." N.C. Gen. Stat. § 14–288.4(a)(2); *Cranford*, 278 F. Supp. 3d at 856.

Cranford continued to preach that women should dress modestly, at times addressing his comments to specific festivalgoers and at one point gesturing to Detective Helms' wife and family, stating

> "All you ladies need to learn how to put on some clothes, too. I'm talkin' to her. I'm talkin' to your family members. And all of those ladies over there. The Bible says that a woman should dress modestly. See a lot of ladies out here dressed like tramps and

> whores and prostitutes today. The Bible says you dress modestly. Today all you ladies who's dressed half-nekkid out here." *Id.* at 854, 872.

Immediately before Cranford's arrest, he and Detective Helms had the following exchange:

> "Defendant Helms interrupted him, 'Sir, you cannot call people whores and prostitutes.' [Cranford] immediately responded, 'The Bible says it calls 'em whores and prostitutes.' Defendant Helms said, 'If you say that one more time, I'ma place you under arrest' and [Cranford] again immediately responded, 'You can't be whores and prostitutes, you can't be.'" *Id.* at 854 (internal citations omitted).

Cranford filed multiple claims relating to his arrest, including a claim for First Amendment retaliation. In considering other claims, the court found probable cause to confer qualified immunity on the defendants for a possible Fourth Amendment violation. *Id.* at 868-874. The court acknowledged that the statements that precipitated Cranford's arrest could have been general professions of his interpretation of Biblical principles, but it also found that it was reasonable to conclude that Cranford may have intended his statements to provoke specific individuals. *Id.* at 869-70. The court found that there had been probable cause to arrest because Cranford was ultimately convicted of disorderly conduct by a state court. *Id.* at 874-875.

The court then concluded that notwithstanding that it was "possible, at least theoretically, that Defendant Helms also acted in retaliation for [Cranford's] exercise of his First Amendment rights,"

Cranford could not state a claim against Detective Helms for retaliatory arrest due to the existence of probable cause. *Id.* at 874.

* * * * *

These cases—more could easily be cited—illustrate the wide range of circumstances in which First Amendment rights would be and sometimes already have been imperiled by a rule of law which bars retaliation claims so long as probable cause exists for an arrest to be made. Application of *Mount Healthy* would assure retaliatory arrest claims are analyzed under a long-applied test, which considers both the existence of probable cause and whether an arrest was motivated by animus to constitutionally protected speech. As a wide variety of speech is susceptible to suppression via arrests, a *per se* rule barring all First Amendment retaliation claims so long as probable cause for an arrest existed is constitutionally indefensible.

II. *MOUNT HEALTHY* MUST BE APPLIED IN RETALIATORY ARREST CASES TO PERMIT VINDICATION OF CRITICAL FIRST AMENDMENT INTERESTS

The above cases also reveal that the framework articulated by this Court in *Mount Healthy*, which considers probable cause, but does not allow its existence, in and of itself, to defeat a retaliatory arrest claim, should be followed. The *Mount Healthy* framework, unlike that set forth in *Hartman*, allows the Court to make crucial inquiries into whether the communicative impact of protected speech impermissibly motivated an arrest. Courts cannot protect First Amendment rights using a mode of inquiry that does not permit them even to examine

whether protected speech was targeted based on its communicative impact.

A. The First Amendment Does Not Permit Courts to Decide Retaliation Claims By Skirting The Essential Inquiry of Whether The Government Targeted Protected Speech Based on its Communicative Impact

The First Amendment demands that courts evaluating the substance of a claim of a First Amendment rights violation must at least inquire into whether state action (1) targets protected speech, and (2) whether that speech was targeted because of its communicative impact. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915-16 (1982) ("The fact that [a non-violent, politically motivated boycott] is constitutionally protected, however, imposes a special obligation on this Court to examine critically the basis on which liability was imposed."). Even where this Court has upheld restrictions on conduct that have secondary effects on speech, it has first, as a threshold matter, analyzed whether or not the application of the law targeted the communicative impact of the conduct. *See United States v. O'Brien*, 391 U.S. 367, 381–82 (1968) ("In other words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct . . . . For this noncommunicative impact of his conduct, and for nothing else, he was convicted.").

1. The *Mount Healthy* Framework Allows Courts to Determine Whether State Action Was Taken to Punish Protected Speech Because of its Communicative Impact

In circuits that apply the *Mount Healthy* framework in retaliatory arrest cases, courts may properly examine whether the officer targeted speech for its communicative impact. In these circuits, the existence of probable cause is considered as one element of the third *Mount Healthy* factor—not as a separate, dispositive element on its own. In ascertaining whether plaintiff's constitutionally protected activity (speech) motivated defendant's adverse action (arrest), the court evaluates whether the presence of probable cause was the but-for cause of the arrest, or if in reality, the arrest only occurred to retaliate against speech that is protected by the First Amendment. *See, e.g., Ford v. City of Yakima*. 706 F.3d 1188, 1193 (9th Cir. 2013). In both *Gullick* and in *Henneberry*, the courts employed this framework to conclude the First Amendment retaliation claims should proceed because of the very real possibility that plaintiffs suffered adverse action in truth not because of any offense they committed, but because they crossed paths with government officials who opposed their political beliefs. *Gullick*, 517 F. Supp. 2d at 1069; *Henneberry*, 2017 WL 1493006 at *11. In resolving on the merits of a claim that a government official retaliated against speech opposing him politically, the court must be able to consider whether the government targeted the speech because of its message. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.11 (1978) ("Freedom of expression has particular significance with respect to government because it is here that the state has a special incentive

to repress opposition and often wields a more effective power of suppression.") (internal quotation marks omitted).

2. Focusing Only on The Existence of Probable Cause Does Not Allow Courts to Consider Whether a State Action Was Taken to Punish Protected Speech Because of its Communicative Impact

If the absence of probable cause is a separate element required to state a claim for retaliatory arrest against an individual officer, a court can dismiss a claim whatever the facts may be, without even addressing critical First Amendment principles. Once the court finds probable cause, the analysis ceases, and the First Amendment retaliation claim is defeated, without the court even looking at whether the plaintiff had engaged in speech deserving of constitutional protection, and whether the officer took action based on the message plaintiff conveyed.

Greene illustrates that if probable cause is a complete bar to a retaliatory arrest claim, the police are empowered with an unconstitutional authority to repress speech that criticizes or offends them. The plaintiff in *Greene* was arrested after he challenged the officer's baseless proposition that he had special power to punish words critical or offensive to him while inside of the police station. 310 F.3d at 892 ("You can't talk to me like that in my building."). As the First Amendment prevents a state legislature from providing the police with the power "to arrest individuals for words or conduct that annoy or offend them," *City of Hill v. Houston*, 482 U.S. 451, 465 (1987), an officer should not be able to seize this power indirectly by enforcing other permissible statutes in a First Amendment-retaliatory fashion. If

an officer does so, he must face a § 1983 claim. Otherwise, in plaintiff's preferred legal world, even if the officer in *Greene* had told the plaintiff that car storage fees could be waived only for confirmed Democrats, plaintiff's outburst at ridiculous viewpoint discrimination would constitute probable cause to arrest, and foreclose a First Amendment retaliation claim.

Cranford also well illustrates the dangers of requiring probable cause as a separate element of a retaliation claim, as it shows how an officer with arguable probable cause may shut down speech with which he disagrees. Although as the court discussed, certain of plaintiff's statements regarding women dressed as "whores and prostitutes" may have been directed as personal attacks on individual women present at the scene—thus creating probable cause to arrest under the relevant state statute prohibiting "words and conduct likely to provide ordinary men to violence"[7] the statements that provoked his arrest were much less clearly targeted at individuals. Indeed, it was arguably plaintiff's interpretation of biblical teachings that precipitated his arrest, as his statement "The Bible says it calls 'em whores and prostitutes" prompted Detective Helms to threaten arrest, and plaintiff's follow-up statement "You can't be whores and prostitutes, you can't be" finally elicited handcuffs. *Cranford*, 278 F. Supp. 3d at 854. Despite plaintiff's and other evidence in the record suggesting that Detective Helms and Chief Kluttz targeted Cranford for arrest based on their knowledge of his prior preaching, the court was not permitted to consider whether plaintiff was arrested in retaliation for expressing his religious views. *Id.* at 875-875. In the Fourth Circuit, once probable cause to arrest for any

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[7] N.C. Gen. Stat. § 14–288.4(a)(2).

reason is found, the court may inquire no further. That is precisely why a rule imposing the far more holistic *Mount Healthy* approach is needed.

B. Granting Police Officers Unfettered Discretion to Punish Via Arrest Speech of Which They Do Not Approve Impermissibly Chills Speech

Petitioners forthrightly acknowledge that analyzing the existence of probable cause as a separate factor in First Amendment retaliation claims for arrests effectively gives officers free rein to retaliate against speech that consists of "challenges to the officers' authority, or simply personal insults." *See* Pet. Br. at 51. However, petitioners argue this consequence is acceptable because speech critical of police officers does not rank on the "highest rung of the hierarchy of First Amendment values," and arrests that shut down such speech are "unlikely to undermine the free exchange of ideas or '[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means.'" Pet. Br. at 51-52 (quoting *Lozman*, 138 S. Ct. at 1954-55, *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964); *Connick v. Myers*, 461 U.S. 138, 145 (1983). To the contrary, criticism of or challenges to the authority of government agents specifically tasked with law enforcement is critical to a democracy. As this Court has observed, "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston*, 482 U.S. at 462-63.

This vital speech criticizing agents of the state is inevitably chilled when citizens cannot be assured

that they will not be arrested for engaging in it. The decision to arrest is influenced by innumerable factors, beyond the simple question of whether the suspect may creditably be charged with having broken the law. Police cannot possibly arrest for every violation of the law that might merit it.[8] A great many laws, particularly statutes that regulate disorderly conduct and/or disturbing the public order as exemplified in *Cranford* and in *Greene*, or Alaska's statute prohibiting intoxication inside bars, could not realistically be enforced against every offender. Police have considerable discretion to decide when to arrest, even if they directly observe circumstances that create probable cause. *See, e.g, Cranford*, 278 F.Supp.3d at 854 (Detective Helms warning plaintiff to stop engaging in preaching directed at specific individuals in potential violation of the statute before actually deciding to arrest.). So too do police have considerable discretion in deciding whether to arrest, which immediately shuts down speech, or to instead issue a citation, which does not. *See, e.g., Henneberry*, 2017 WL 1493006 at *11 (considering officer's decision to arrest plaintiff rather than to issue a citation as evidence of retaliatory motive.).

While it is settled law that the Constitution permits police to exercise discretion in deciding whether or not to arrest, this latitude necessarily requires courts to assess whether a retaliatory arrest supported by probable cause was primarily motivated by retaliation for protected speech. A person who does not know when

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[8] And, as *Greene* well illustrates, those who have not broken the law may still be arrested—Mr. Greene was cleared on the charges of creating a disturbance. The very essence of probable cause is that officers are permitted to arrest on suspicion of, not confirmation of, illegal activity.

police may exercise discretion to arrest pursuant to innumerable statutes that are selectively enforced cannot be certain that her controversial speech will not suddenly trigger ultra-strict enforcement of an obscure traffic law or loitering statute. Absent a clearly established and enforced remedy via a retaliation claim, the uncertainty surrounding when an officer might actually arrest out of disagreement with the expressed views of the speaker could create the very uncertainty that causes citizens to "steer far wider of the unlawful zone. . ." *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

There is a significant risk that a citizen who has publicly challenged and criticized governmental authority will find himself unceremoniously arrested later, on a charge entirely unrelated to his speech. *See Gullick*, 517 F. Supp. 2d 1063; *Henneberry*, 2017 WL 1493006. It is far easier to cease one's controversial speech than it is to design one's life so that no police officer could ever suspect one of having committed a violation of any one of the innumerable laws imposed by our society. In petitioners' world, the risks of attending or participating in controversial protests would multiply. If, for example, a clash between pro-choice and pro-life activists sparked a riot, under petitioner's framework the police would be free to arrest only the pro-life activists when there was probable cause to do so. In fact, even if an officer acknowledged that she rounded up only pro-life protesters, an arrest would not be actionable so long as probable cause for a violation of law existed.

C. No Other Government Power Can Be Deployed in Retaliation For Speech While Maintaining Immunity From a §1983 Claim.

In other circumstances where it is plain that a police officer or other government official took

adverse action due to an outspoken citizen's protected speech, a First Amendment retaliation claim may follow. *See, e.g., Linnemann v. City of Aberdeen,* 2013 WL 3233526, *7 (D. Md. June 25, 2013) (First Amendment retaliation claim sustained where officer threw anti-abortion signs into the middle of the street); *Richter v. Maryland,* 590 F. Supp. 2d 730, 734 (D. Md. 2008) *aff'd sub nom, Richter v. Beatty,* 417 F. App'x 308 (4th Cir.2011) (First Amendment retaliation claim sustained where person of ordinary fitness would likely "refrain from putting political speech on their cars if they thought that they would suffer immediate retaliation in the form of a repair order" issued by police); *Dorr v. Weber,* 741 F. Supp. 2d 1010, 1020 (N.D. Iowa 2010) (First Amendment retaliation claim sustained where the sheriff denied renewal of his concealed carry permit due to his political advocacy activities, including passing out flyers for an organization that advocated shrinking the budget of the county government, including the sheriff's office). In fact, no other government official may take adverse action against a person who has insulted a police officer. *See J.G. Ex Rel. K.C. V. Hackettstown Public School District,* No. 8-cv-2365 (PGS)(DEA) (D.N.J., August 8, 2018) (student could proceed with retaliation claim where school suspended her after referring to a fictional police officer in reading material for English class as a "pig.").

Because government officials cannot generally wield any discretionary power with absolute immunity from retaliation claims, most government officials must persistently carry out government functions even in the face of speech with which they disagree. Unlike the officer in *Greene,* most government officials cannot terminate an interaction with a person they find irritating, disrespectful, or disagreeable

through a swift exercise of the arrest power. Nor can governmental officials use any discretionary power as a sword in a debate on important social and political issues. The rule sought by petitioners would allow the arrest power to be used in precisely this fashion. In *Cranford*, some of plaintiff's preaching against women dressing as "whores and prostitutes" was directed specifically at Detective Helms wife. *Cranford*, 278 F.Supp.3d at 872 ("plaintiff pointed in the direction of [Helms'] wife, who was sitting next to him, and said 'I'm talking to you and your family.'"). Detective Helms testified that this particular part of plaintiff's speech nearly provoked him to violence, in support of his argument that there was probable cause to arrest plaintiff for breach of the peace. *Id.*at 872 n.8. Had Detective Helms retaliated violently, this would have plainly violated plaintiff's First Amendment rights. But he did not retaliate violently, because as the court observed, Detective Helms was able to respond in a way "not available to the civilian spectators" by forcibly placing plaintiff under arrest, shutting down the articulation of religious views with which he did not agree. *Id.* Because there was probable cause, Helms could not face a First Amendment retaliation claim—even though he continued to verbally spar with plaintiff after he said the words that created probable cause, and even though there was evidence in the record that Detective Helms and Chief Kluttz targeted plaintiff for arrest based on their knowledge of his prior preaching.

This Court should not countenance the establishment of a legal framework that gives police officers the ultimate trump card in a dispute with a person who has an opposing viewpoint ranging from religious or political views to a simple desire to protest concerning any of society's innumerable problems. The check of

a First Amendment retaliation claim must be available, even in situations where there is probable cause to arrest.

CONCLUSION

For the reasons stated above, this Court should reject any mode of analysis for First Amendment retaliatory arrest claims that permits official conduct to go unchecked that is rooted in a desire to retaliate against protected speech. If the presence of probable cause alone defeats the existence of a First Amendment retaliatory arrest claim under all circumstances, arrests rooted in an effort to stifle protected speech will be judicially unscrutinized and undisturbed. Such a result risks impairing public confidence in both law enforcement and the judiciary. At the same time, it is irreconcilable with this Court's duty to protect First Amendment rights.

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Respectfully submitted,

ALLEN DICKERSON
INSTITUTE FOR FREE SPEECH
124 South West Street,
Suite 201
Alexandria, VA 22314
(703) 894-6800
adickerson@ifs.org

FLOYD ABRAMS
Counsel of Record
KATHLEEN E. FARLEY
BENJAMIN A. TAYLOR
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, NY 10005
(212) 701-3000
fabrams@cahill.com

Attorneys for Amicus Curiae
Institute for Free Speech

No. 17-1174

In the Supreme Court of the United States

LUIS A. NIEVES AND BRYCE L. WEIGHT,

Petitioners,

v.

RUSSELL P. BARTLETT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

PAUL M. SHERMAN
Institute for Justice
901 N. Glebe Road
Suite 900
Arlington, VA
22203
(703) 682-9320

MICHAEL B. KIMBERLY
Counsel of Record
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
mkimberly@mayerbrown.com

Counsel for Amicus Curiae

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INTEREST OF THE *AMICUS CURIAE* AND SUMMARY OF ARGUMENT

The Institute for Justice (IJ) is a nonprofit public-interest law firm that litigates in support of greater judicial protection for individual rights, including citizens' First Amendment right to speak about issues of public concern in their communities.[1]

As part of its efforts, IJ works to empower citizens affected by local government policies to become activists for change. IJ has trained thousands of these activists in person, including more than 2,400 property rights activists whose homes or businesses were threatened with blight designations or eminent domain and more than 900 entrepreneurs whose businesses were harmed by regulation. IJ has also worked with more than 150 communities of property owners and entrepreneurs who sought to change local law or oppose harmful proposed projects—including, for example, a group of food truck owners in Sarasota, Florida, fighting an ordinance prohibiting food trucks from operating within 800 feet of a brick-and-mortar restaurant without the owner's consent, and homeowners in a Charlestown, Indiana, neighborhood targeted for redevelopment.

In addition to training activists in person, IJ has assisted countless others by publishing "survival guides" for entrepreneurs and opponents of eminent domain to use in organizing grassroots political cam-

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties have filed blanket consents to the filing of *amicus curiae* briefs with the Clerk.

paigns in their communities. See, *e.g.*, Inst. for Justice, *Entrepreneur's Survival Guide* (Sept. 2014), perma.cc/-PFG5-BK54. These guides instruct activists on how to advocate for change in local government policies.

IJ has a strong interest in ensuring that courts are able to hold governments accountable when they unlawfully arrest individuals in retaliation for exercising their First Amendment rights. The question presented here directly implicates that interest.

A holding that a retaliatory arrest claim is barred when the arrest was supported by probable cause would seriously erode Americans' ability to exercise their First Amendment rights. By foreclosing any judicial inquiry into the motivations behind an arrest—even where there is substantial evidence of a retaliatory motive—a probable cause bar would block a large number of meritorious retaliatory arrest claims. Moreover, by replacing the burden-shifting framework of *Mt. Healthy City School District Bd. of Education* v. *Doyle*, 429 U.S. 274 (1977), with a legal standard far more deferential to the government, the probable cause bar would encourage officials to retaliate through arrests rather than by other means that would remain subject to meaningful First Amendment scrutiny.

Thus, a probable-cause bar would deter citizens from speaking on issues of public concern. It is relatively easy for a person speaking out against government action to be arrested on some charge, and a probable cause bar would ensure that any First Amendment claim based on such an arrest would fail. Faced with the risk of retaliatory arrest and likely deprived of any legal recourse, many citizen activists will avoid public speech and assembly rather than expressing their views—a result that cannot be squared with the values that animate the First Amendment.

ARGUMENT

A. The question presented implicates important First Amendment values.

1. Democracy in America works when, and only when, every American is able to exercise "the prized American privilege to speak one's mind." *Bridges* v. *California*, 314 U.S. 252, 270 (1941). It is crucial that citizens be free not only to vote on Election Day but also to speak on issues of public concern without fear of reprisal.

Citizen speech, as this Court has explained, is essential to democratic governance because it is the mechanism by which public opinion informs government action. The American system presupposes that politicians will be "cognizant of and responsive to [the] concerns" of their constituents; indeed, "[s]uch responsiveness is key to the very concept of self-governance through elected officials." *McCutcheon* v. *FEC*, 572 U.S. 185, 227 (2014). This responsiveness, in turn, depends on maintaining a culture of open and robust public discourse. See *Stromberg* v. *People of State of Cal.*, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people * * *, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."). Public debate on critical issues indicates to elected officials what their constituents expect—and by drawing the public into the political process, it fosters a spirit of civic-mindedness.

Though public debate takes many shapes, there is no more quintessential form of political advocacy than public protests, demonstrations, and assemblies. The First Amendment recognizes the importance of such activities by protecting "the right of the people peace-

ably to assemble" separately from the freedom of speech. U.S. Const. amend. I. And this Court's public-forum doctrine is founded on the understanding that public spaces, "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

To be sure, as this Court has repeatedly observed, the right to assemble and speak in public "is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order." *Hague*, 307 U.S. at 516. Thus, public speech activities are subject to "reasonable restrictions on [their] time, place, or manner" (*Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)), and law enforcement is frequently and rightly called upon to enforce those restrictions. But as this Court recently recognized, this policing entails "a risk that some police officers may exploit the arrest power as a means of suppressing speech." *Lozman* v. *City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1953 (2018). Law enforcement officers may, for example, single out the most vocal people at a protest, or those with particular slogans or signs.

The threat of reprisal from law enforcement may not be a strong deterrent to professional political activists and organizers, but many Americans who engage in public speech activities or attend public assemblies are not professional activists. On the contrary, they are often people who do not generally attend such public events or demonstrations but happen to be passionate about a particular issue or topic. These would-be activists have views that deserve to be heard—whether they pertain to policies at the national level or local government actions likely to impact their individual rights or livelihoods. But such activists are also

particularly susceptible to being deterred from speaking if they believe that they will face arrest for doing so.

B. Barring claims for retaliatory arrest where probable cause exists would severely chill First Amendment activity.

A categorical bar on First Amendment retaliation claims for arrests supported by probable cause would deal a serious blow to First Amendment freedoms. Under that approach, courts would be forbidden from undertaking the same kind of inquiry into the government's motives that they perform without difficulty in other First Amendment retaliation cases. Such an approach would give law enforcement free rein to deal with disfavored speakers through arrests, rather than other measures that would incur meaningful First Amendment scrutiny. This, in turn, would exert a serious chill on activists' protected political speech.

1. A categorical probable-cause bar would prevent courts from identifying the true motive behind government retaliation.

Like many other constitutional doctrines, the First Amendment's protection against government retaliation for individuals' speech implicates courts in the task of determining the motivation for state action. But in First Amendment retaliation cases, courts take a much harder look at governmental intent than they do in other contexts.

In these cases, under the burden-shifting framework of *Mt. Healthy*, 429 U.S. at 287, plaintiffs need only show that their protected First Amendment activity was a "motivating factor" behind government action against them in order to make out a prima facie

case of retaliation. The burden then shifts to the government to show, by a preponderance of the evidence, "that it would have reached the same decision * * * even in the absence of the protected conduct." *Id.* This framework enables courts to hold state actors accountable for retaliation when they act with unlawful motives, while allowing official actions to stand when they would have been taken even absent any retaliation. And as respondent notes, that test has worked well in practice for years. Resp't Br. 42.

Under the approach favored by petitioners, however, no inquiry into governmental intent could ever occur, because a retaliatory arrest claim would be categorically barred as long as probable cause for the arrest existed. Pet'rs Br. 13-16. The result would be to insulate the government actors from liability even where, as here, there is enough evidence to go to a jury on the question whether an arrest was based on a retaliatory motive. Pet. App. 6.

The protection afforded to First Amendment rights should not turn on the method by which the government infringes them—but that is the result of an approach that requires judges and juries to close their eyes to the improper motive behind retaliatory arrests. In circumstances like these, there is no compelling reason to preclude the trier of fact from assessing the motivation for an arrest and to hold the defendant liable if the arrest is found to have been in retaliation for First Amendment activity.

2. *A categorical probable-cause bar would unduly chill First Amendment activity.*

Given that a probable-cause bar would preclude many meritorious claims for retaliatory arrest from going forward (by precluding scrutiny of the motivation

for the arrest), there can be no doubt that the bar would also severely chill First Amendment activity.

To start, this Court has often recognized that governmental retaliation for the exercise of First Amendment rights "'offends the Constitution'" by "'threaten[ing] to inhibit exercise of the protected right.'" *Hartman* v. *Moore*, 547 U.S. 250, 256 (2006) (quoting *Crawford-El* v. *Britton*, 523 U.S. 574, 588 n.10 (1998)); see also, *e.g.*, *Perry* v. *Sinderman*, 408 U.S. 593, 597 (1972) (noting that if the government could take adverse action based on an individuals' First Amendment activity, "his exercise of those freedoms would in effect be penalized and inhibited"). Retaliation puts a person to the intolerable choice of exercising his rights and facing personal jeopardy on the one hand, and refraining from protected speech activities on the other. Faced with that choice, all but the most courageous individuals will refrain from exercising their First Amendment rights—undermining the "uninhibited, robust, and wide-open" debate on public issues that the First Amendment protects above all else. *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

Retaliatory *arrest*, moreover, is one of the most fearsome tools for reprisal available to government officials. It is often easy for a police officer or other government actor to find a legal pretext on which to arrest someone whose speech is thought objectionable. For example, the offense for which respondent was arrested—harassment in the second degree—can be committed by "insult[ing], taunt[ing], or challeng[ing] another person in a manner likely to provoke an immediate violent response." Alaska Stat. Ann. § 11.61.120-(a)(1). That vague standard could sweep up virtually any passionate speech uttered in a police officer's presence. And even leaving that statute aside, an officer inclined to retaliate against a person based on

his speech could likely arrest him for jaywalking, loitering, disorderly conduct (Alaska Stat. Ann. § 11.61.110), "[r]efusing to assist a peace officer" (*id.* § 11.56.720(a)), or many other infractions.

And once an arrest is made—even for a trivial offense—the potential consequences are serious:

> A custodial arrest exacts an obvious toll on an individual's liberty and privacy, even when the period of custody is relatively brief. The arrestee is subject to a full search of her person and confiscation of her possessions. * * * The arrestee may be detained for up to 48 hours without having a magistrate determine whether there in fact was probable cause for the arrest. Because people arrested for all types of violent and nonviolent offenses may be housed together awaiting such review, this detention period is potentially dangerous. And once the period of custody is over, the fact of the arrest is a permanent part of the public record.

Atwater v. *City of Lago Vista*, 532 U.S. 318, 364-65 (2001) (O'Connor, J., dissenting) (citations omitted); *id.* at 346 (majority opinion) (acknowledging that, at a minimum, custodial arrests present the opportunity for "gratuitous humiliation[]" of the arrestee). It is self-evident, therefore, that an arrest, accompanied by these collateral consequences, is among the most drastic forms of government retaliation.

It follows that a probable-cause bar will have a profound chilling effect on First Amendment activity. That is so for two reasons. First, as we have shown, by effectively precluding governmental liability for retaliatory arrest as long as probable cause is present, the bar ensures that many instances of unlawful

retaliation will go unredressed. And second, by making it much harder to prove a claim for retaliatory arrest than for other retaliatory conduct, the bar encourages the government to retaliate by way of arrests, rather than other means.

The prospect of reprisal through arrest will surely deter many would-be activists from speaking out on public issues. As explained above, many people who engage in public speech are novices who find the prospect daunting. If they believe that they will be retaliated against if the content of their speech offends the wrong official, these individuals will either censor their political speech or refrain from speaking altogether—to their own detriment and to the detriment of the community that is deprived of hearing their views. The First Amendment cannot abide that result.

This Court's decision last Term in *Lozman* v. *City of Riviera Beach, Florida* is unlikely to be a meaningful check on such abuses. Although *Lozman* held that an individual arrested for speaking out against local government policies could maintain a retaliatory-arrest claim notwithstanding the existence of probable cause for his arrest, the decision relied on the proposition that the facts of that case were "far afield from the typical retaliatory arrest claim." 138 S. Ct. at 1954. Indeed, the Court noted, the petitioner in *Lozman* "allege[d] more governmental action than simply an arrest"; rather, he alleged that he was retaliated against "pursuant to an 'official municipal policy' of intimidation" and that the city government he criticized "formed a premeditated plan to intimidate him." *Ibid.* (quoting *Monell* v. *Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 691 (1978)). The Court held that, because "[a]n official retaliatory policy is a particularly troubling and potent form of retaliation," there is "a compelling need for adequate avenues of

redress" that justified dispensing with any probable-cause bar. *Ibid.* That "narrow" holding is unlikely to give much protection to individuals who find themselves in less extreme circumstances (*id.* at 1951); only a holding in *this* case affirmatively rejecting a probable-cause bar for all arrests will ensure that those individuals are able to exercise their First Amendment rights in full.

C. Retaliatory arrests are a greater threat to First Amendment activity than retaliatory prosecutions.

In saying all this, we are mindful that the Court, in *Hartman* v. *Moore*, 547 U.S. 250, 265-66 (2006), held that probable cause is a bar to a retaliatory prosecution claim. We agree with respondent that extension of *Hartman*'s rule to the arrest context is unwarranted as a legal matter because *Hartman*'s logic does not apply in the context of retaliatory arrests. See Resp't Br. 34-42. But as a factual matter, too, retaliatory arrests and retaliatory prosecutions are different matters altogether—and extending *Hartman*'s rule to the retaliatory arrest context would pose a far greater threat to protected speech.

The decision whether to prosecute is a weighty one, made after multiple levels of review by multiple officials. A police officer cannot alone make the decision. Instead, a line attorney in the prosecutor's office typically coordinates with the police or other law enforcement officers before making a recommendation to his or her superior. The decision whether to prosecute then ordinarily requires the approval of one or more senior officials before an indictment is filed in the name of the state district attorney or U.S. Attorney or handed up by a grand jury. These layers of review better ensure

that decisions to prosecute are thoughtful and deliberate, and not the product of whim or malice.

By contrast, the decision whether or not to arrest is typically made in the heat of the moment by a single police officer, with little to constrain his or her discretion. Indeed, as we demonstrated above (at 7-8), the grounds for probable cause necessary for a lawful arrest are hardly a safeguard against capricious or abusive conduct—jaywalking, "harassment," and disorderly conduct are enough. And as this Court noted in *Lozman*, the "'presumption of regularity accorded to prosecutorial decisionmaking,'" on which *Hartman* partly relied, "does not apply" to arrests. *Lozman*, 138 S. Ct. at 1953 (quotations omitted).

Arrest is also an easier means of retaliation in light of the difference in the legal standards applied to arrests and prosecutions. An officer need only have probable cause to believe that a crime has been committed to arrest an individual. See, *e.g.*, *Devenpeck* v. *Alford*, 543 U.S. 146, 152 (2004). A decision to prosecute requires more: Under generally accepted principles, a prosecutor should bring criminal charges only if they are supported by probable cause *and* "admissible evidence will be sufficient to support conviction beyond a reasonable doubt." See Standards for Criminal Justice § 3-4.3(a) (ABA 2015). A retaliatory arrest thus may on its face appear lawful, even reasonable, where a retaliatory prosecution would not.

In short, affirming the lower court here has far greater potential to chill First Amendment activity than might have the Court's decision in *Hartman*. That counsels strongly against petitioners' bid to extend *Hartman*'s rule to retaliatory arrests.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL M. SHERMAN
Institute for Justice
901 N. Glebe Road
Suite 900
Arlington, VA
22203
(703) 682-9320

MICHAEL B. KIMBERLY
Counsel of Record
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
mkimberly@mayerbrown.com

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BRIEF OF NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND NATIONAL SHERIFFS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

LISA E. SORONEN
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, NW, Ste. 515
Washington, D.C. 20001
202-434-4845
lsoronen@sso.org

SEAN R. GALLAGHER
BENNETT L. COHEN*
BRITTON ST. ONGE
POLSINELLI PC
1401 Lawrence Street, Ste. 2300
Denver, CO 80202
303-572-9300
bcohen@polsinelli.com

**Counsel of Record*

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF THE *AMICI CURIAE*[1]

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities is dedicated to helping city leaders build better communities. The League is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,400 cities. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a non-profit professional and educational organization consisting of more than 11,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

The National Sheriffs' Association is a 26 U.S.C. § 501(c)(4) non-profit association formed in 1940 to promote the fair and efficient administration of criminal justice throughout the United States, and to promote the public safety of our nation's local communities. The Association has some 21,000 individual members and is a strong advocate for our nation's over 3,000 Departments/Offices of Sheriff who are directly elected by the people in their local parish, county or city. The Association promotes the public-interest goals and policies of law enforcement in our nation and it participates in judicial processes where the vital interests of the public, law enforcement, and its members are being affected.

Amici curiae are national organizations representing elected and appointed officials of state and local

governments. Members of these organizations employ law enforcement officers who keep the peace and protect public order and safety. State and local law enforcement officers frequently encounter situations similar to the one at issue in this case.

SUMMARY OF THE ARGUMENT

This case presents this Court's most recent opportunity to craft definitional elements for the federal tort of First Amendment retaliatory arrest. In particular, a decision on the merits would allow this Court to resolve a circuit split regarding whether First Amendment retaliatory arrest claimants in a typical case must plead and prove the absence of probable cause for their arrest—a question that this Court left open in *Reichle v. Howards*, 566 U.S. 658 (2012), and did not resolve in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018).

Reichle and *Lozman* lie at endpoints on the continuum of retaliatory arrest scenarios. The instant case presents a more typical scenario: one where police arrive in the midst of a complicated and fluid situation, and must make quick decisions to maintain public safety. *Amici* submit that the best rule for the "mine run" of retaliatory arrest claims, like this one, is to require the absence of probable cause. Law enforcement requires knowledge of the law, but law enforcement officers are (typically) not attorneys, or judges. The legal standard of probable cause is constitutional, clear,

objective, and what law enforcement officers are trained on so they can make arrests in the heat of complicated, rapidly evolving and sometimes violent situations without having to pause for analysis. The no-probable-cause rule is therefore the right rule for the mine run of cases. It is also the only workable rule. Only a no-probable-cause rule can prevent the sort of *post-hoc* factual and legal deconstruction that every claimed retaliatory arrest situation will inevitably invite, as even this "typical" retaliatory arrest scenario confirms.

In adopting such a rule, the Court can take comfort from the fact that retaliatory arrest claimants will not necessarily be put out of court by the existence of probable cause for their arrest. Claimants are free to pursue state-law claims, allowing the states to develop and refine the law in this area. Free speech retaliatory arrest is a tort claim, and tort law ordinarily develops through the states' common-law process. The 50 state constitutions offer meaningful protections against the abridgment of the freedom of speech, and nothing prevents plaintiffs from pressing their rights under appropriate state law.

STATEMENT OF THE CASE

Amici adopt Petitioners' statement of the case. *Amici* note that the facts of this case—an alcohol-fueled party on the last night of Alaska's Arctic Man extreme winter sports festival—fit well within what

this Court described as the "mine run" of cases that it was concerned with in *Lozman*. *See Lozman*, 138 S. Ct. at 1954. This case presents a version of the "bar fight" scenario Justice Kennedy described at oral argument in *Lozman*:

> You have people that are fighting in a bar and the—the policeman has to get some order and the—one of the more difficult suspects says something bad to the policeman, and he arrests him. Under your view, that's a violation [of the First Amendment]?

Lozman oral argument transcript at 5:23–6:3.

This Court's two most recent retaliatory arrest cases, by contrast, did not produce a general rule because they presented facts at the opposing ends of the continuum of cases. In *Reichle*, a Secret Service agent had to decide on the spot whether to arrest someone who had just shoved the Vice President in an unsecure environment, lied about it, and was otherwise uncommunicative. The claimant asserted that even though he had assaulted the Vice President and then lied about it, the supposedly *real* reason the agent arrested him was for expressing his displeasure with the administration's foreign policy. It is hard to imagine a less credible claim of retaliatory motive for the arrest. Lozman's retaliation claim arguably lies on the other end of the spectrum. After viewing the video of Lozman's arrest just a few seconds into his calm remarks at a city council meeting, and considering it in light of the city council's prior discussion of "intimidating"

him, it is hard to imagine a more credible allegation of retaliatory motive.[2]

This case, by contrast, presents a version of the "bar fight" scenario that Justice Kennedy recognized lies in the middle of the continuum of cases, and which this Court's rules must address.

ARGUMENT

This Court has understandably struggled to craft a retaliatory arrest rule that properly balances free speech values with a desire to spare police and other law enforcement from easily-alleged and often meritless or trivial retaliation claims. *See Lozman*, 138 S. Ct. 1953–54 (discussing the inherent tensions in crafting a rule that accommodates these competing values).

Amici support Petitioners' position that the existence of probable cause should defeat a retaliatory arrest claim as a matter of law, using the analytical framework of *Hartman v. Moore*, 547 U.S. 250 (2006), rather than *Mount Healthy City Board of Education v.*

[2] Even Lozman's retaliatory arrest claim can be squared with a no-probable-cause rule. Lozman had his day in court. He asked for a jury, and chose to represent himself in front of that jury. The court submitted the question of probable cause to the jury. The jury may well have rejected Lozman's retaliatory arrest claim for any of the myriad reasons juries do—*e.g.*, because perhaps they just didn't like Mr. Lozman—and the jury's questionable probable cause determination may have been the vehicle to reach this outcome.

Doyle, 429 U.S. 274 (1977). The no-probable-cause rule is consistent with the constitutional principles at stake, closely tracks general tort principles, accommodates the distinctive features of retaliatory arrest claims, and is consonant with First Amendment values. A no-probable-cause rule also gives law enforcement clear guidance in the field, something this Court prefers when crafting constitutional rules to govern police conduct. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). This rule also will better weed out frivolous retaliatory arrest claims early on—or better yet, will dissuade plaintiffs from asserting meritless claims at all. And the no-probable-cause rule avoids the sort of *post-hoc* deconstruction of arrest scenarios that inevitably arise when the parties lawyer up, but is only likely to obscure rather than elucidate an arresting officer's true motives.

Additionally, in crafting a federal tort of retaliatory arrest cognizable through Section 1983, this Court should be mindful that similar claims can be brought under available state law. States are free to develop their own versions of the tort of retaliatory arrest pursuant to state constitutions and the common law process. States are not constrained by Section 1983's importation of 19th-century tort principles, but are free to develop the law in this area as they see fit. Adopting the no-probable-cause rule for federal Section 1983 claims will still leave courthouse doors open for claimants who present claims deemed worthy under state law.

A. The Ninth Circuit stands alone in permitting retaliatory arrest claims despite probable cause.

This Court is familiar with the circuit split on whether to apply a no-probable-cause rule to retaliatory arrest claims from *Reichle* and *Lozman*. The Ninth Circuit appears to stand alone in permitting retaliatory arrest claims despite probable cause, per *Ford v. City of Yakima*, 706 F.3d 1188, 1195-96 (9th Cir. 2013).[3] The fact that the large majority of circuits have lined up on the other side of this issue is itself persuasive authority that the no-probable-cause requirement is the better rule.

B. Qualified immunity does not provide adequate protection.

This Court has identified two key problems with relying on qualified immunity to act as a safeguard against frivolous or meritless First Amendment retaliatory arrest claims.

First, the nature of a First Amendment retaliatory arrest claim naturally lends itself to easily manufactured factual disputes regarding the subjective

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[3] The Tenth Circuit sided with the Ninth in *Reichle*, but that decision was effectively reversed by this Court in an opinion which noted how the Tenth Circuit's own case law did not clearly reject a no-probable-cause rule. *Reichle*, 566 U.S. at 670, n.7. The Tenth Circuit has not re-sided with the Ninth on this issue since its correction in *Reichle*.

motivation of the police officer. As Justice Alito noted during oral argument in *Lozman*:

> [I]f there is in a case a genuine issue about the officer's motivation, I don't see how the officer will ever be able to get dismissal based on qualified immunity. . . . And if there's any evidence, circumstantial evidence, of—of retaliatory motives, such as the person who's arrested saying something that's insulting to the officer, you're going to be able to infer that.

Lozman oral argument transcript at 21:23-22:2; 22:14-19.

Because retaliatory arrest cases, by their very nature, require the fact-finder to delve into the officer's subjective motivation for the arrest, courts will always be inclined to send these cases to a jury rather than dispose of them through qualified immunity.

Second, lower courts' failure to apply qualified immunity has fairly compelled this Court to take the extraordinary step of summarily reversing the lower courts on a number of occasions. *See, e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (*per curiam*); *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018); *White v. Pauly*, 138 S. Ct. 577 (2017) (*per curiam*); *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (*per curiam*); *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015). In reversing these erroneous denials of qualified immunity, the Court has "repeatedly stressed that courts must not define clearly established law at a high level of generality, since doing so avoids the crucial

question whether the official acted reasonably in the particular circumstances that he or she faced." *Wesby*, 138 S. Ct. at 590.

The fact that this Court has needed to continually summarily reverse the lower courts because of their failure to properly follow the Court's directives regarding qualified immunity strongly suggests that the doctrine is not serving as an adequate shield from liability for reasonable police officers making arrests based on probable cause. Chief Justice Roberts noted as much at oral argument in *Lozman*:

> Well, we get a lot of cases, particularly from where you've said, the cases you have looked at, where qualified immunity is applied in a case where we found it necessary to—to reverse. I'm not sure that it's as solidly established a doctrine as—as you suggest to protect—to—to leave—we can allow this action because qualified immunity will take care of the—the problems.

Lozman oral argument transcript at 17:14-23.

The Ninth Circuit's failure to apply qualified immunity to Respondent Bartlett's retaliatory arrest claim provides yet another example of this phenomenon. The Ninth Circuit saw fit to withhold qualified immunity from the Petitioners because it viewed its circuit law rejecting the no-probable-cause rule for retaliatory arrest claims as established, based on *Ford*. But even where a particular circuit's law is settled, the existence of a split among the circuits supports the

application of qualified immunity. *See Wilson v. Layne* 526 U.S. 603, 618 (1999) (noting that where circuits are split, "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."). This Court could therefore summarily reverse the Ninth Circuit in this case based on its failure to apply qualified immunity, as it did in *Kisela* and *Sheehan*, and as it reversed other circuits in the above cases.

But this Court's resources are obviously better used by announcing a general substantive rule of law that appropriately precludes claims that should not be brought in the first place, such as a no-probable-cause rule for First Amendment retaliatory arrest cases. Having declined to announce a general rule for these claims in *Reichle* and *Lozman*, the time has clearly come for this Court to announce this rule here, in this mine-run type retaliatory arrest case.

C. Permitting retaliatory arrest claims despite probable cause will hinder the operations of state and local governments.

A rule permitting retaliation lawsuits in the face of probable cause will significantly affect the ability of state and local law enforcement to perform their protective functions. Law enforcement officers face unfamiliar and potentially life-threatening situations every day. Similar to the decision whether to use force when making an arrest, the decision to make an arrest in the first place—determining whether probable

cause exists—is made "not in the courtroom but at the scene," often in a "split second." *Wong Sun v. United States*, 371 U.S. 471, 499 (1963) (Clark, J., dissenting). An officer must respond to a situation he or she encounters then and there, without the luxury of consulting an attorney beforehand to determine whether an arrest will later embroil him or her in a lawsuit. Where an officer has probable cause, the decision to arrest is not one this Court should force an officer to second guess on pain of personal liability simply because a judge or jury, years later, may see the situation differently. The stakes are too high to impose such a burden on officers.

An officer who, based on instinct, training, and (most importantly) probable cause, decides it is appropriate to arrest someone should not face personal liability for that decision simply because the arrestee thinks he or she was arrested for his or her speech—or because the arrestee likes to sue police officers. As this Court noted during questioning in *Reichle*, such claims would be easy enough to set up—a claimant need only put an "I hate the police" bumper sticker on his car. *See Reichle* oral argument transcript at 39:6-12. Claimants without cars could for example wear "Make America Great Again" hats and "Black Lives Matter" t-shirts—a sartorial combination that could provide a basis for a speech-based retaliation lawsuit in most any situation. And, as *Reichle* makes clear, the speech component of any and every political protest can supply a basis for retaliation claims by those arrested. *See, e.g.*, Tyler Layne, "575 people arrested during immigration

protest in D.C." (June 28, 2018); Hayden Ristevski & Stephan Johnson, "LMPD arrests 9 Occupy ICE protesters for blocking Immigration Court" at (July 26, 2018); CBS News, "Anti-gun violence protesters shut down part of Chicago freeway" (July 7, 2018).[4] These recent political protests resulting in substantial arrests can be counted upon to generate their share of retaliatory arrest lawsuits.

While easily manufactured, retaliation claims cannot be weeded out with similar ease for the simple reason that retaliatory arrest situations always provide a rich source of speech and conduct that claimants can use to survive procedural hurdles. While this Court's recent tightening of pleading standards in *Twombly* and *Iqbal* discounts mere conclusory allegations, it is hard to imagine a police encounter resulting in an arrest that will not supply enough speech and conduct to permit a claimant to survive a challenge under Rule 12(b)(6).

Rule 56 is similarly ill-equipped to screen out meritless claims, given the obligation to view facts in the light most favorable to the non-moving claimant, who sees every act as motivated by retaliatory animus. Petitioners' brief provides an illustrative list of

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[4] Available respectively at https://dcw50.com/2018/06/28/575-people-arrested-during-immigration-protest-in-d-c/; http://www.w[illegible].com/story/38737760/occupy-ice-protesters-blocking-entrance-to-louisvilles-immigration-court; and https://www.cbsnews.com/news/chicago-interstate-94-dan-ryan-expressway-protesters-to-draw-attention-to-gun-violence-2018-07-07/. All three web pages last visited August 20, 2018.

retaliatory arrest cases of dubious merit that, under the Ninth Circuit's minority rule, must go to trial in order to be disposed of.

Even when claimants are entirely sincere, an arrest's temporal proximity to the speech makes it easy for an arrestee to *perceive* the speech as motivating the arrest. Officers may have difficulty rebutting the inference that speech caused the arrest. *See New York v. Quarles*, 467 U.S. 649, 656 (1984) (noting the "kaleidoscopic situation[s]" officers face, where "spontaneity" is "necessarily the order of the day" and officers must respond "out of a host of different, instinctive, and largely unverifiable motives"). Petitioners' brief catalogues the many ways that speech attendant to an arrest may be irrelevant to the arrest, or legitimately taken into account by law enforcement, but nonetheless wrongly perceived by an arrestee as motivated by a desire to retaliate against the arrestee's protected speech.

In addition to Petitioners' litany of sound reasons for imposing a no-probable-cause rule, there is the inevitable *post-hoc* deconstruction of an arrest. Every encounter that leads to an arrest with attendant speech will provide a rich canvas for later deconstruction by lawyers. Here, for example, Respondent Bartlett claims that Officer Nieves retaliated against his exercise of First Amendment rights when Nieves allegedly said, *after* making the arrest: "bet you wish you would have talked to me now." Although this alleged comment was not captured on any of the arrest video, and was disputed, the Ninth Circuit held that this allegation supported Bartlett's First Amendment retaliation

claim. This illustrates how retaliatory arrest cases are often constructed *post-hoc*, and thus can bear little if any relation to the actual facts, conduct, and motivations of the participants at the scene. The *post-hoc* constructed nature of Respondent Bartlett's position is further emphasized by how his narrative arguably implicates Fifth Amendment rights more than First Amendment ones.[5] Respondent's apparent constitutional confusion in this case, echoed by the Ninth Circuit, is testament to how any situation resulting in an arrest will provide a rich source of speech, conduct and potential motivation for later deconstruction and *post-hoc* reconstruction into a retaliation lawsuit.

Permitting retaliation claims in the face of probable cause would prompt officers to second-guess themselves in tense and rapidly evolving situations like the one here. Officers would have to stop to ask themselves whether they truly are making an arrest based on a concern that a crime has been or is about to be committed, or instead whether their personal views of the arrestee's speech are motivating the decision in some

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[5] This Court has recognized that citizens have a right to ignore the police when questioned, and police lack probable cause or reasonable suspicion to support the questioning. *Florida v. Royer*, 460 U.S. 491, 498 (1983). *Royer*, however, did not ground this right in the First Amendment. The right would appear to be better grounded in the Fifth Amendment right to remain silent in the face of law enforcement officers' investigatory questioning. Respondent Bartlett did not sue for Fifth Amendment retaliation, and there is no legally cognizable theory of Fifth Amendment retaliation for an arrestee who declines to answer a police officer's investigatory questions, but nonetheless supplies probable cause for his arrest.

way. And when officers are confident in the righteousness of their motives and legal analysis, they may still choose not to make a justifiable and prudent arrest because they know their decisions will be misconstrued by the arrestee—perhaps honestly, perhaps deliberately, but likely inevitably.

Finally, beyond the direct financial costs they consume (*e.g.*, attorney's fees, lost employee productivity due to depositions and other case preparations), frivolous or meritless retaliation lawsuits can also impose significant reputational harm on both the officer and local government. The prospect of facing personal liability for actions taken in the line of duty contributes to police departments' struggle to fill and maintain their ranks. *See* Sean Curtis, *4 reasons why police departments are struggling to fill their ranks*, Policeone.com (Oct. 12, 2017).[6] Rejecting the no-probable-cause rule would amplify this recruitment and retention problem.

D. The First Amendment is not the sole bulwark against retaliatory arrests; the 50 State Constitutions also protect free speech.

Justice Thomas's thorough and incisive dissent in *Lozman* provides the analytical framework for a federal no-probable-cause rule that should apply to this

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[6] Available at https://goo.gl/5KLKjx (last visited August 20, 2018).

case and the mine run of retaliatory arrest cases. *Lozman*, 138 S. Ct. at 1955-59 (Thomas, J., dissenting).

Justice Thomas's dissent, however, is necessarily framed by Section 1983 and its 19th-century federalization of certain areas of tort law. *See Lozman*, 138 S. Ct. 1956–57 (discussing how Section 1983 claims are "a species of tort liability" that the Court develops through the common law process). Since *Erie*, this Court has properly left development of tort law to the states, and generally eschewed the notion of federal common law save in those narrow areas where such a process is called for, such as defining Section 1983 claims. This rare dive into tort law through Section 1983 serves as a reminder that the states are the traditional and primary fonts for tort claims, and developers of theories of tort liability.

By adopting a no-probable-cause rule for the mine run of Section 1983 retaliatory arrest claims as a federal matter, this Court would not prevent the states from developing this area of tort law differently. All 50 State Constitutions include provisions that protect against speech abridgment.[7] The various state

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[7] *See* Ala. Const. art. 1, § 4; Alaska Const. art. I, § 5; Ariz. Const. art. 2, § 6; Ark. Const. art. 2, § 6; Cal. Const. art. 1, § 2(a); Colo. Const. art. II, § 10, Conn. Const. art. I, § 4; Del. Const. art. I, § 5; Fla. Const. art. I, § 4; Ga. Const. art. I, § 1, ¶ 5; Haw. Const. art. I, § 4; Idaho Const. art. I, § 9; Ill. Const. art. I, § 4; Ind. Const. art. 1, § 9; Iowa Const. art. I, § 7; Kan. Const. Bill of Rights § 11; Ky. Const. § 8; La. Const. art. I, § 7; Me. Const. art. I, § 4; Md. Const. Declaration of Rights, art. 10; Mass. Const. Pt. 1, art. XXI; Mo. Const. art. I, § 8; Mont. Const. art. II, § 7; Neb. Const. art. I-5; Nev. Const. art. 1, § 9; N.H. Const. Pt. I, art. 22; N.J. Const.

formulations do not always mirror the First Amendment, but all provide rich safeguards for speech.[8]

This Court has long acknowledged that its interpretation of the First (and Fourteenth) Amendments does not limit "the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."

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art. I, § 6; N.M. Const. art. II, § 17; N.Y. Const. art. I, § 8; N.C. Const. art. I, § 14; N.D. Const. art. I, § 4; Ohio Const. art. I, § 11; Okla. Const. § II-22; Or. Const. art. I, § 8; Pa. Const. art. I, § 7; R.I. Const. art. I, § 21; S.C. Const. art. I, § 2; S.D. Const. art. VI, § 5; Tenn. Const. art. 1, § 19; Tex. Const. art. I, § 8; Utah Const. art. I, § 15; Vt. Const. ch. I, art. 13; Va. Const. art. I, § 12; Wash. Const. art. I, § 5; W. Va. Const. art. III, § 7; Wis. Const. art. I, § 3; Wyo. Const. art. I, § 20.

[8] *Compare, e.g.*, Cal. Const. art. 1, § 2(a) ("Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."); Me. Const. art. I, § 4 ("Every citizen may freely speak, write and publish sentiments on any subject, being responsible for the abuse of this liberty."); N.H. Const. Pt. I, art. 22 ("Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved."); Or. Const. art. I, § 8 ("No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."); R.I. Const. art. I, § 21 ("No law abridging the freedom of speech shall be enacted."); Va. Const. art. I, § 12 ("That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press.").

Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980); *see also Kelo v. City of New London*, 545 U.S. 469, 489 (2005) (saying same thing with respect to Fifth Amendment Takings Clause); *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (same for Fifth Amendment protection against self-incrimination).

Some states have taken the Court's statements to heart by construing their constitutions to protect more speech than the First Amendment does. *See, e.g.*, *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 773 P.2d 455, 459 (Ariz. 1989) ("Indeed, this court has previously given art. 2, § 6 [of the Arizona Constitution] greater scope than the first amendment."); *People ex rel. Arcara v. Cloud Books, Inc.*, 503 N.E.2d 492, 557–58 (N.Y. 1986) ("[T]he minimal national standard established by the Supreme Court for First Amendment rights cannot be considered dispositive in determining the scope of this state's constitutional guarantee of freedom of expression.").

Some states have also taken the lead in construing their constitutions to protect against abridgment of speech by private actors. For example, the New Jersey Supreme Court has held that the New Jersey Constitution's free-speech clause is "available against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms." *State v. Schmid*, 423 A.2d 615, 628 (N.J. 1980) (reversing on state constitutional grounds a trespass conviction for distributing political literature at Princeton without permission); *see*

Dublirer v. 2000 Linwood Ave. Owners, Inc., 103 A.3d 249, 251 (N.J. 2014) (sustaining on state-law grounds a challenge to private high-rise cooperative apartment building's "home rule" barring soliciting and distributing written materials in the building).

The California Supreme Court has similarly construed California's state constitution, by holding that a privately owned shopping mall is a public forum where visitors can exercise their freedom of speech the same way they would be entitled to do on a city sidewalk. *Robins v. Pruneyard Shopping Center*, 592 P.2d 341, 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980); *see Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742 (Cal. 2007) (holding that the right to free speech embodied in the California Constitution even includes the right to urge customers in a private shopping mall to boycott one of its stores). *Accord Bock v. Westminster Mall Co.*, 819 P.2d 55, 56 (Colo. 1991) ("Within the public spaces of the Mall, Article II, Section 10 [of the Colorado Constitution] protects petitioners' rights to distribute political pamphlets and to solicit signatures pledging nonviolent dissent from the federal government's foreign policy toward Central America.").

Adopting a no-probable-cause rule for First Amendment retaliatory arrest claims under Section 1983 does not prevent states from taking a different approach under their respective state constitutions. This Court can take the opportunity of its decision in this case to remind retaliatory arrest claimants that their rights can be vindicated through state law just as effectively (and perhaps more effectively) than through federal

law, which is necessarily more constrained than state common law due to its grounding in Section 1983 and attendant 19th-century principles of tort law. *See* Jeffrey S. Sutton, *Why Teach—and why Study—State Constitutional Law*, 34 Okla. City U. L. Rev. 165, 173–76 (2009) (describing the many advantages of developing rights as a matter of state constitutional law). If, however, this Court takes Respondents' proposed route of applying the *Mt. Healthy* framework even in the face of probable cause, claimants will continue bringing their retaliatory arrest claims in federal court because federal courts will always be the most accommodating forum, and this area of state tort law will likely remain forever undeveloped.

CONCLUSION

Now that it is presented with a mine-run retaliatory arrest case, this Court should hold that probable cause for the arrest defeats a claim for First Amendment retaliation as a matter of law, reverse the Ninth Circuit's contrary rule, and seal the federal circuit split. This Court can also remind claimants that they can bring state law retaliatory arrest claims in state courts, where the common law process is not constrained the way it is in federal court.

Respectfully submitted,

LISA E. SORONEN
STATE AND LOCAL
LEGAL CENTER
444 North Capitol Street, NW,
Ste. 515
Washington, D.C. 20001
202-434-4845
lsoronen@sso.org

SEAN R. GALLAGHER
BENNETT L. COHEN*
BRITTON ST. ONGE
POLSINELLI PC
1401 Lawrence Street,
Ste. 2300
Denver, CO 80202
303-572-9300
bcohen@polsinelli.com

**Counsel of Record*

Counsel for Amici Curiae

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No. 17-1174

IN THE
Supreme Court of the United States

LUIS A. NIEVES, *et al.*,

Petitioners,

v.

RUSSELL P. BARTLETT,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE NATIONAL POLICE ACCOUNTABILITY PROJECT, RODERICK & SOLANGE MACARTHUR JUSTICE CENTER, AMERICAN CIVIL LIBERTIES UNION, AND ACLU OF ALASKA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

DAVID D. COLE
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

ESHA BHANDARI
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

DAVID M. SHAPIRO
Counsel of Record
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
375 E. Chicago Ave.
Chicago, IL 60611
(312) 503-0711
david.shapiro@law.northwestern.edu

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 1.5 million members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU of Alaska is a state affiliate of the national ACLU. Since its founding in 1920, the ACLU has frequently appeared before this Court in First Amendment cases, both as direct counsel and as amicus curiae. Many landmark civil rights decisions of the 1950s and 1960s arose out of free speech controversies, and involved the government's attempted use of its arrest powers to silence ideas and movements critical of government. *See, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). History demonstrates that governmental efforts to retaliate against particular viewpoints are often aimed at those who challenge and criticize the status quo. The preservation of the principle of viewpoint neutrality is therefore of immense concern to the ACLU, its civil rights clients seeking justice, and its members and donors.

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild to address allegations of misconduct by law-enforcement and detention-facility officials through coordinating and assisting civil-rights lawyers representing their victims. NPAP has approximately six hundred attorney members

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

practicing in every region of the United States. NPAP provides training and support for these attorneys and other legal workers, public education and information on issues related to law-enforcement and detention-facility misconduct and accountability, and resources for non-profit organizations and community groups involved with victims of such misconduct. NPAP supports legislative efforts aimed at increasing law-enforcement and detention-facility accountability, and appears regularly as an amicus curiae in cases such as this one presenting issues of particular importance for its member lawyers and their clients, who include protesters and victims of police misconduct.

The Roderick and Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at the Northwestern Pritzker School of Law, at the University of Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. RSMJC attorneys have led civil rights battles in areas that include police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated men and women.

SUMMARY OF ARGUMENT

"The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987).

Police officers sometimes arrest people in retaliation for protected expression. Speech that triggers police retaliation takes two principal forms. First, officers retaliate with arrests when protesters direct their outrage at police misconduct. Second, in "contempt of cop" arrests, police retaliate against people who disagree with or criticize them for actions or attitudes in the course of their employment, making arrests for technical infractions that would normally result in citation and release or no citation at all.

This Court recognized in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), that the existence of probable cause does not immunize government actors against First Amendment claims for retaliatory arrest in all circumstances. The Court should now hold that such circumstances include instances where police officers arrest someone with the purpose to silence or punish protected speech.

If a person can be arrested for speech so long as there happens to be probable cause to arrest for something else, police can arrest people solely because of speech they disfavor. It is easy to find a pretext for arrest because statutes and ordinances forbid a wide range of unremarkable human activity—like wearing saggy pants, crossing the street while reading a text message, and barbecuing in a front yard.

More specifically, ordinary protest activities commonly violate an array of statutes and municipal ordinances that prohibit a wide range of broadly defined activities, such as blocking sidewalks, amplifying sound, unlawful assembly, and disorderly conduct. These laws extend to so much behavior that

police frequently have probable cause to believe that a protestor has broken a law. Therefore, if probable cause categorically defeats a retaliatory arrest claim, the police will acquire the power to arrest protesters for the very purpose of silencing disfavored messages.

ARGUMENT

I. ILLEGAL ARRESTS FOR DISFAVORED SPEECH ARE A SYSTEMIC PROBLEM IN MANY LAW ENFORCEMENT AGENCIES.

Recent years have witnessed a series of well-documented findings that certain police departments systemically arrest people in retaliation for their speech. Two types of protected speech commonly trigger retaliatory arrests: (1) protests and demonstrations perceived as "anti-police," and (2) "contempt of cop" encounters in which an officer feels slighted or insulted.

In a 2015 report, the Department of Justice found that "suppression of speech" by the Ferguson, Missouri Police Department (FPD) "reflects a police culture that relies on the exercise of police power—however unlawful—to stifle unwelcome criticism." UNITED STATES DEPARTMENT OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 28 (2015).[2] The report noted that despite a settlement agreement and a consent decree in two separate cases regarding protest activities, "it appears that FPD continues to interfere with

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[2] Available at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

individuals' rights to protest and record police activities." *Id.* at 27. For example, on February 15, 2015, the six-month anniversary of the shooting death of Michael Brown, "protesters stood peacefully in the police department's parking lot, on the sidewalks in front of it, and across the street." *Id.* The police responded with retaliatory arrests:

> Video footage shows that two FPD vehicles abruptly accelerated from the police parking lot into the street. An officer announced, "everybody here's going to jail," causing the protesters to run. Video shows that as one man recorded the police arresting others, he was arrested for interfering with police action. Officers pushed him to the ground, began handcuffing him, and announced, "stop resisting or you're going to get tased." It appears from the video, however, that the man was neither interfering nor resisting. A protester in a wheelchair who was live streaming the protest was also arrested. . . . Six people were arrested during this incident. It appears that officers' escalation of this incident was unnecessary and in response to derogatory comments written in chalk on the FPD parking lot asphalt and on a police vehicle.

Id. at 27–28.

Similarly, in 2011, the Department of Justice issued a findings letter regarding the Maricopa County Sheriff's Office (MCSO) in Arizona:

> We find that MCSO command staff and deputies have engaged in a pattern or practice

> of retaliating against individuals for exercising their First Amendment right to free speech. Under the direction of Sheriff Arpaio and other command staff, MCSO deputies have sought to silence individuals who have publicly spoken out and participated in protected demonstrations against the policies and practices of MCSO—often over its immigration policies.

Letter from Thomas E. Perez, Assistant Attorney General, to William R. Jones, Counsel, Maricopa County Sheriff's Office, at 13 (Dec. 15, 2011).[3] For example, during two separate meetings of the County Board of Supervisors, deputies arrested several individuals who expressed criticism of the MCSO. *Id.* at 14. None of the protesters were convicted. *Id.* The Department of Justice concluded: "The arrests and harassment undertaken by MCSO have been authorized at the highest levels of the agency and constitute a pattern of retaliatory actions intended to silence MCSO's critics." *Id.*

The Department of Justice made similar findings regarding the Baltimore Police Department in 2016: "BPD violates the First Amendment by retaliating against individuals engaged in constitutionally protected activities. Officers frequently detain and arrest members of the public for engaging in speech the officers perceive to be critical or disrespectful." UNITED STATES DEPARTMENT OF JUSTICE,

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[3] Available at https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf.

INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 9 (2016).[4]

A recent preliminary injunction decision issued by the United States District Court for the Eastern District of Missouri analyzes the St. Louis Police Department's response to protests triggered by the acquittal of Officer Jason Stockley for the fatal shooting of Anthony Lamar Smith. *Ahmad v. City of St. Louis*, No. 17-cv-2455, 2017 WL 5478410, at *1 (E.D. Mo. Nov. 15, 2017). These protests, which began on Friday, September 15, 2017, were directed at both the verdict and "broader issues, including racism and the use of force by police officers." *Id.* "The participants often express[ed] views critical of police." *Id.*

As the protests continued on Sunday, September 17, there were reports of protesters damaging property, and some protesters put on goggles and masks (likely because of concerns about tear gas or mace). *Id.* at *3.

In an illustration of the manner in which very broad laws empower the police to retaliate against speakers, the police declared an "unlawful assembly" and then carried out a mass arrest. *Id.* at *3–5. In fact, Lieutenant Timothy Sachs testified that officers have sole discretion to declare an assembly unlawful because there are no policies or guidelines defining when it is appropriate to do so. *Id.* at *6.

After declaring an unlawful assembly, and giving orders to disperse, police blocked off points of egress and trapped the protesters in an intersection by marching toward it. *Id.* at *4–5. Then they made a

[4] Available at https://www.justice.gov/crt/file/883296/download.

mass arrest of everyone trapped in the intersection, even though the protesters complied with police commands. *Id.* at *5.

Ultimately, the district court issued a preliminary injunction. *Id.* at *17–18. One provision enjoins the police from declaring "an unlawful assembly . . . for the purpose of punishing persons for exercising their constitutional rights to engage in expressive activity." *Id.* at *18.

One particularly common form of retaliation occurs when police arrest people for what has come to be called "contempt of cop." In these cases, a police officer has probable cause to believe an offense has occurred, but the suspect's speech, perceived as disrespectful, is the real reason for the arrest, as opposed to a citation and release. Notably, *Police Magazine*, which bills itself as "the law enforcement magazine" and a "community for cops[,]" has a glossary of "cop slang" which defines "Contempt of Cop" as "the true underlying behavior of disrespect toward an officer leading to an expensive ticket or arrest for an offense that actually is a law violation." *Contempt of Cop*, POLICE MAGAZINE: COP SLANG.[5]

A 1999 review of the New Jersey State Police by then-New Jersey Attorney General John J. Farmer documented a common phenomenon of arresting people for "contempt of cop":

> The single most common allegation among all the allegations reviewed was improper attitude and demeanor. This is true in law enforcement nationwide. We observed in

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[5] Available at http://www.policemag.com/cop-slang/contempt-of-cop.aspx (last visited Oct. 4, 2018).

> several cases a problem which, for lack of a better term, may be called "occupational arrogance." The discussion of this problem is by no means unique to the New Jersey State Police. In fact, internal affairs detectives at one municipal police department, noting its prevalence, termed this phenomenon "contempt of cop." Simply put, it is the tendency for certain police officers to approach the public with an attitude that they, the officer, are in no way to be challenged or questioned. Among the cases we reviewed, several seem to illustrate this phenomenon.

FINAL REPORT OF THE STATE POLICE INTERVIEW TEAM 93–94 (1999).[6]

More recently, the Department of Justice found that Newark Police Department officers often arrest people for contempt of cop: "The [Newark Police Department's] arrest reports and [internal affairs] investigations . . . reflect numerous instances of the [department's] inappropriate responses to individuals who engage in constitutionally protected First Amendment activity, such as questioning or criticizing police actions." UNITED STATES DEPARTMENT OF JUSTICE, INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 13 (2014).[7] In one instance, for example, "an individual was arrested after he questioned officers' decision to arrest his neighbor." *Id.*

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[6] Available at https://pdfs.semanticscholar.org/649c/a046a3baca0f9ebafa2641b744c8a2b80e06.pdf.

[7] Available at https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf.

Similarly, in the Ferguson report, the Department of Justice found that police not only retaliated against demonstrators, but also that officers routinely made "contempt of cop" arrests:

> [O]fficers frequently make enforcement decisions based on what subjects say, or how they say it. Just as officers reflexively resort to arrest immediately upon noncompliance with their orders, whether lawful or not, they are quick to overreact to challenges and verbal slights. These incidents—sometimes called "contempt of cop" cases—are propelled by officers' belief that arrest is an appropriate response to disrespect.

UNITED STATES DEPARTMENT OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 25 (2015). Notably, the breadth of offenses contained in Feguson's municipal code made it easy to come up with charges. "These arrests are typically charged as a Failure to Comply, Disorderly Conduct, Interference with Officer, or Resisting Arrest." *Id.*

II. BROAD REGULATIONS MAKE IT ALL TOO EASY TO FIND PROBABLE CAUSE TO ARREST PEOPLE FOR DISFAVORED SPEECH.

If the existence of probable cause, standing alone, defeats a retaliatory arrest claim, the police will acquire vast discretion to punish dissent by arresting protesters with whom they disagree. Many laws are so broadly written and prohibit so much activity that it is very easy for police to arrest people in retaliation for their speech. In various municipalities across the United States, it is illegal to wear saggy

pants,[8] to cross a street while viewing a cell phone,[9] and to have a barbecue in one's front yard.[10]

This Court has long recognized the threat of censorship posed by laws that endow the police with excessive discretion. In *City of Houston v. Hill*, the Court noted that an ordinance challenged in the case "criminalizes a substantial amount of constitutionally protected speech, and accords the police unconstitutional discretion in enforcement. The ordinance's plain language is admittedly violated scores of times daily, yet only some individuals—those chosen by the police in their unguided discretion—are arrested." 482 U.S. 451, 466–67 (1987).

To be sure, the vagueness and overbreadth doctrines provide a partial antidote to laws that confer wide discretion to trench on protected speech. That said, courts cannot be in the business of

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[8] Abbeville, Louisiana Code of Ordinances § 13-25 ("It shall be unlawful for any person in a public place or in view of the public to wear pants or a skirt in such a manner as to expose their underlying garments."); *see also* William C. Vandivort, Note, *I See London, I See France: The Constitutional Challenge to "Saggy" Pants Laws*, 75 BROOK L. REV. 667, 673 (2009) (cataloging similar saggy pants ordinances across the country).

[9] Revised Ordinances of Honolulu § 15-24.23, https://www.honolulu.gov/rep/site/ocs/roh/ROH_Chapter_15a21_28_.pdf ("No pedestrian shall cross a street or highway while viewing a mobile electronic device.").

[10] Berkeley, Missouri Code of Ordinances § 210.2250 ("Subject to certain exceptions mentioned hereinbelow, no person shall be permitted to barbecue or conduct outdoor cooking in front of the building line of any single-family dwelling, multi-family dwelling or commercial structure."); *see also* Pagedale, Missouri Code of Ordinances § 210.750(A).

invalidating every law that prohibits some protected conduct or could be worded more lucidly. "Invalidating any rule on the basis of its hypothetical application to situations not before the Court is 'strong medicine' to be applied 'sparingly and only as a last resort.'" *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 743 (1978) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). Some laws are broad enough that the threat of retaliatory enforcement is quite serious, but not so broad as to warrant the "strong medicine" of facial invalidation.

Furthermore, the vagueness and overbreadth doctrines apply only to laws that regulate speech. Most laws, of course, do not regulate speech. Thus, for example, if an officer arrests a motorist driving one mile over the speed limit because the officer dislikes a political bumper sticker on the car, the motorist cannot make a First Amendment vagueness or overbreadth challenge to the speeding law. In cases where the offense of arrest does not regulate speech, the only remedy for an individual is to bring a First Amendment retaliation claim demonstrating that the arrest was carried out solely to punish the expression of a disfavored viewpoint.

A. Laws Affecting Protest Provide Probable Cause For Arrest In A Wide Range Of Circumstances.

Protesters often violate broad statutes and ordinances that prohibit a wide range of activity, such as blocking sidewalks, unlawful assembly, violating noise ordinances, and disorderly conduct. Because these laws encompass so much conduct, the police have probable cause to arrest large numbers of protesters. For example, in *Ahmad*, the court noted

that in St. Louis, "an individual officer can decide, in his or her discretion, to declare an unlawful assembly, and there are no guidelines, rules, or written policies with regard to when an unlawful assembly should be declared." 2017 WL 5478410, at *6.

Even leaving aside the constitutional validity of such laws affecting protests, selective enforcement of such laws can provide a cover for viewpoint discrimination by police. Where there is evidence that police have chosen to enforce such laws only against critics they disagree with, or to punish certain viewpoints, the existence of probable cause should not categorically bar a retaliation claim. If probable cause categorically defeats a retaliatory arrest claim, the police will be able to wield the power to arrest protesters for the very purpose of silencing disfavored messages.

1. Unlawful Assembly And Failure To Disperse

Under typical "unlawful assembly" ordinances, "officials can disperse a protest as long as they conclude that participants are at some point planning to engage in forceful or violent lawbreaking." John Inazu, *Unlawful Assembly as Social Control*, 64 U.C.L.A. L. Rev. 2, 7 (2017). Because these statutes grant police the power to disperse gatherings that could lead to force or violence, officers "are forced to rely on judgments and inferences about future acts" by protesters or bystanders. *Id.* at 6–7. In fact, some unlawful assembly statutes allow the police to disperse a protest where they believe the demonstrators will engage in an act that is illegal but nonviolent. *Id.* at 7.

The ability to declare an unlawful assembly based solely on predictions about the intent of the protesters, and in the absence of any observed violence or illegality, vests the police with too much power to shut down protests with which they disagree. For example, the California Penal Code defines "unlawful assembly" to include two or more people gathering for the purpose of committing an act that is unlawful, but non-violent: "Whenever two or more persons assemble together to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly." Cal. Penal Code § 407. Unlawful assembly is a misdemeanor. Cal. Penal Code § 408.[11]

Police have used their discretion under unlawful assembly laws to "target citizens across the political spectrum, including civil rights workers, antiabortion demonstrators, labor organizers, environmental groups, Tea Party activists, Occupy protesters, and antiwar protesters." Inazu, *supra*, at 5.

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[11] *See also* Idaho Code §§ 18-6404, 18-6405 (2017) (stating that the misdemeanor of unlawful assembly occurs "[w]henever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous or tumultuous manner . . ."); Iowa Code § 723.2 (2017) ("An unlawful assembly is three or more persons assembled together, with them or any of them acting in a violent manner, and with intent that they or any of them will commit a public offense. A person who willingly joins in or remains a part of an unlawful assembly, knowing or having reasonable grounds to believe that it is such, commits a simple misdemeanor.").

2. Blocking Roads And Sidewalks

State and local governments often prohibit blocking roads, highways, and sidewalks. For example, the Code of the District of Columbia provides that "[i]t is unlawful ... [t]o crowd, obstruct, or incommode ... [t]he use of any street, avenue, [or] alley." D.C. Code § 22–1307(a) (2016).[12]

The police use these laws to arrest protesters. For example, following the police shooting of Alton Sterling, police arrested numerous protesters in Baton Rouge under Louisiana's obstruction of a highway law. Third Amended Complaint at 4–6, *Tennart v. City of Baton Rouge*, No. 17-179-JWD-EWD (M.D. La. filed July 13, 2017). The plaintiffs in the *Tennart* case allege that they were arrested on "the pretext that the protesters had violated a state law proscribing obstruction of highways and public roads." *Id.* at 3.[13]

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[12] *See also* Ga. Stat. § 16-11-43 (2017) ("A person who, without authority of law, purposely or recklessly obstructs any highway, street, sidewalk, or other public passage in such a way as to render it impassable without unreasonable inconvenience or hazard and fails or refuses to remove the obstruction after receiving a reasonable official request or the order of a peace officer that he do so, is guilty of a misdemeanor."); La. Rev. Stat. § 14:97 (2017) ("Simple obstruction of a highway of commerce is the intentional or criminally negligent placing of anything or performance of any act on any railway, railroad, navigable waterway, road, highway, thoroughfare, or runway of an airport, which will render movement thereon more difficult.").

[13] Roderick and Solange MacArthur Justice Center attorneys are among the counsel for the *Tennart* plaintiffs.

3. Disorderly Conduct Ordinances

Police also arrest protesters under disorderly conduct ordinances. In *Lewis v. City of Tulsa*, "prolife activists were picketing an abortion clinic." 775 P.2d 821, 822 (Okla. Crim. App. 1989). Clayton Lewis and other activists stood 50-60 feet away from the entrance to the clinic and yelled at people entering that "it was murder. You should feel guilty about what you are doing." *Id.* For these lawful activities, Mr. Lewis was arrested and convicted under Tulsa's disorderly conduct ordinance. *Id.* The Oklahoma Court of Criminal Appeals ultimately reversed his conviction. *Id.*

4. Noise Ordinances

Noise ordinances typically impose limits on the amplification of sound. For example, the Chicago Municipal Code provides:

> No person on the public way shall employ any device or instrument that creates or amplifies sound, including but not limited to any loudspeaker, bullhorn, amplifier, public address system, musical instrument, radio or device that plays recorded music, to generate any sound, for the purpose of communication or entertainment, that is louder than average conversational level at a distance of 100 feet or more, measured vertically or horizontally, from the source.

Chicago Mun. Code § 8-32-070(a) (2017).[14]

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[14] *See also, e.g.*, Norfolk Code of Ordinances § 26-4 (2017) ("Operating, playing or permitting the operation or playing of any . . . bullhorn, megaphone, sound amplifier or similar device which produces, reproduces or amplifies sound in such

Police often use noise and amplification provisions to arrest protesters. For example, Stephen Nylen, alleges in a case proceeding in the United States District Court for the Western District of Michigan that police have repeatedly threatened him with arrest under a noise and amplification ordinance. Second Amended Compl. at 5, *Nylen v. City of Grand Rapids*, No. 17-cv-716 (W.D. Mich. filed Nov. 20, 2017). Roughly half of these arrest threats occurred while Mr. Nylen was speaking about his faith on a public sidewalk near an abortion clinic. *Id.* at 5.

Similarly, in the aftermath of the shooting of Michael Brown in Ferguson, Missouri, three plaintiffs were arrested for failure to comply with a police order during a peaceful protest that followed a candlelight vigil. First Amended Compl. at 4, *Powers v. City of Ferguson*, No. 16-cv-1299 (E.D. Mo. filed August 9, 2016). Three days later, another plaintiff was arrested for violating a noise ordinance while waiting for the police to release Antonio French, an alderman arrested during the protests. Powers was acquitted of the charges at trial. *Id.* at 5. In 2015, protesters demanding expanded Medicaid coverage were threatened with arrest for noise violations for singing outside the chambers of the Florida House of Representatives. *20 Arrested at North Carolina*

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a manner as to create noise disturbance across a real property line boundary or within a noise sensitive zone set forth in table I, 'Maximum Sound Pressure Levels,' shall constitute a violation of this section, unless allowed pursuant to an exception established by ordinance.").

Legislature Protest in April Face Judge, 11 ABC News (Jun. 8, 2017).[15]

B. Police Officers Exploit The Discretion Created By Broad Laws To Arrest Protesters With Whom They Disagree.

Police officers have used the discretion provided by broad statutes and ordinances to retaliate against speakers and demonstrators with whom they disagree. For example, in September of 2015, Michael Picard was protesting legally near a DUI checkpoint with a sign that read "Cops Ahead. Keep Calm and Remain Silent." Amy Wang, *Cops Accidentally Record Themselves Fabricating Charges Against Protester, Lawsuit Says*, Wash. Post (Sept. 20, 2016). He was also legally recording the police with his cell phone. *Id.* One of the officers slapped Picard's cell phone out of his hand and confiscated it. *Id.* The officer inadvertently allowed the cell phone camera to continue recording as he and other officers discussed charging Picard. *Id.*

The transcript of the video provides a rare glimpse into how police officers (in this case, Master Sergeant Patrick Torneo, Sergeant John Jacobi, and Trooper John Barone) sometimes fabricate charges to retaliate against a protester. Torneo is heard saying: "Have that Hartford lieutenant call me, I want to see if he's got any grudges."[16] Barone asks: "You want me to punch a number [slang for opening an

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[15] Available at http://abc11.com/politics/20-arrested-at-nc-legislature-face-judge/772567/.

[16] The full video is available here: https://www.washingtonpost.com/news/post-nation/wp/2016/09/20/cops-accidentally-record-themselves-fabricating-charges-against-protester-lawsuit-says.

investigation] on this either way? Gotta cover our ass."[17]

The officers proceed to debate how to charge Picard, illustrating how broad statutes and ordinances often grant the police vast discretion to effectuate retaliatory arrests:

Jacobi: So, we can hit him with reckless use of the highway by a pedestrian and creating a public disturbance, and whatever he said.

Barone: That's a ticket?

Jacobi: Two tickets.

Barone: Yeah.

Jacobi: That's a ticket with two terms, yeah. It's 53a-53-181, something like that for—

Barone: I'll hit him with that, I'll give him a ticket for that.

Jacobi: Crap! I mean, we can hit him with creating a public disturbance.

Jacobi: All three are tickets-

Torneo: Yep.

Jacobi: We'll throw all charges three on the ticket.

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[17] *See supra* n.14.

> Torneo: And then we claim that, um, in backup, we had multiple people, um, they didn't want to stay and give us a statement, so we took our own course of action. [18]

The Department of Justice Ferguson report also illustrates the phenomenon of police creatively charging people in order to retaliate against them for protected speech. In one case, "a police officer arrested a business owner on charges of Interfering in Police Business and Misuse of 911 because she objected to the officer's detention of her employee." UNITED STATES DEPARTMENT OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 25 (2015). Indeed, the officer made the arrest after the business owner attempted to call the police chief, which "suggests that [the officer] may have been retaliating against her for reporting his conduct." *Id.* In another instance, an officer arrested a man for violating an extremely broad "Manner of Walking in Roadway" ordinance because the man cursed at the officer. *Id.*

Similarly, in *Allee v. Medrano*, this Court found a "persistent pattern of police misconduct," in the enforcement of Texas statutes, including an unlawful assembly law, against activists seeking to organize a farmworkers' union. 416 U.S. 802, 815 (1974). The Court noted that the district court found that "the defendants selectively enforced the unlawful assembly law ... treating as criminal an inoffensive union gathering...." *Id.* at 808 (citation omitted).

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[18] *See supra* n.14.

In *Ford v. City of Yakima*, 706 F.3d 1188, 1191 (9th Cir. 2013), an officer arrested and jailed a motorcyclist under a noise ordinance. The officer decided to make the arrest because he became irritated with the motorist for (lawfully) talking back. *Id.* at 1190–91. Prior to the arrest, the officer made a series of statements that included, "[i]f you run your mouth, I will book you in jail for it. Yes, I will, and I will tow your car," and "[i]f you have diarrhea of the mouth, you will go to jail." *Id.* The officer also said: "A lot of times we tend to cite and release people for [noise ordinance violations] or we give warnings. However ... you acted a fool ... and we have discretion whether we can book or release you. You talked yourself—your mouth and your attitude talked you into jail." *Id.*

CONCLUSION

In protests against the police, some see courage and dissent, while others see insult, exaggeration, and ingratitude. Freedom of expression lives and breathes in that clash of ideologies, a reflection of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The First Amendment commands that conflicts of ideas must be resolved through public discourse—not through retaliatory arrests intended to silence one side of the conversation. For that reason, this Court should affirm the judgment below.

Respectfully submitted,

DAVID D. COLE
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

ESHA BHANDARI
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

DAVID M. SHAPIRO
Counsel of Record
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
375 E. Chicago Ave.
Chicago, IL 60611
(312) 503-0711
david.shapiro@law.northwestern.edu

Counsel for Amici Curiae

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No. 17-1174

IN THE

Supreme Court of the United States

LUIS A. NIEVES, ET AL.,
Petitioners,

v.

RUSSELL P. BARTLETT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION AND 30 MEDIA AND FREE SPEECH ORGANIZATIONS IN SUPPORT OF RESPONDENT

Robert D. Balin
Counsel of Record
Abigail B. Everdell
Davis Wright Tremaine LLP
21st Floor
1251 Avenue of the Americas
New York, NY 10020-1104
(212) 489-8230
robertbalin@dwt.com

Charles S. Sims
Media Freedom &
Information Access Clinic
Yale Law School
P.O. Box 208215
New Haven, CT 06520

Mickey H. Osterreicher
National Press
Photographers Association
120 Hooper Street
Athens, GA 30602

Counsel for *Amici Curiae*

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTION PRESENTED

Does the existence of probable cause defeat a First Amendment retaliatory arrest claim under 42 U.S.C. § 1983 as a matter of law?

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INTEREST OF *AMICI CURIAE*[1]

Amici, described in Appendix A, include a broad array of the nation's leading news organizations and press advocacy groups, including lead *amicus* National Press Photographers Association (NPPA). The membership of NPPA, the nation's leading professional organization for photojournalists, includes photographers, members of the press generally, and citizen journalists, on whose behalf the NPPA advocates in disputes involving interference with First Amendment rights to report on news and matters of public interest.

The interest of *Amici* in this case is to ensure that the crucial role members of the press and citizen reporters play in promoting discussion of matters of public concern is properly accounted for. The question presented in this case is of particular importance to the press, whose institutional role is to serve as a watchdog and check on government. If probable cause bars claims for retaliatory arrests, the government will be given unbridled discretion that can be used to chill and intimidate journalists.

SUMMARY OF ARGUMENT

This case arises from an arrest for disorderly conduct at a remote outdoor festival in Alaska, but the question presented—depending on how broadly

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[1] All parties have consented to this *amicus curiae* brief through letters of consent filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

or narrowly it is answered—may have far-reaching implications for freedom of the press. The specific factual circumstances giving rise to this case make it a poor vehicle for definitely resolving the question presented for a wide range of cases.[2] But if the mere existence of probable cause to make an arrest for any offense precludes constitutional claims alleging First Amendment retaliation for the exercise of free speech, police officers, public officials they act for, and the government obtain an insurmountable advantage in the balance of equities and the ability to turn a shield into a sword for use in deterring or suppressing public criticism.

These issues are of vital importance to members of the press, whose institutional role is to serve as a

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[2] *Amici* have serious concerns regarding whether the Court may have improvidently granted certiorari in this case. We note that Respondent Bartlett's First Amendment claim is premised largely on his assertion that he was arrested for refusing to speak with Sergeant Nieves. *See, e.g.*, J.A. 284-85. And it was this allegation that formed the basis of the Ninth Circuit decision under review. *See* Pet. App. at 6 ("Bartlett alleged that Sergeant Nieves said 'bet you wish you would have talked to me now' after his arrest. This statement, if true, could enable a reasonable juror to find that Sergeant Nieves arrested Bartlett in retaliation for his refusal to answer Sergeant Nieves' questions earlier in the evening."). There is, of course, a constitutional right under the *Fifth* Amendment to not speak to law enforcement officers, *Malloy v. Hogan*, 378 U.S. 1, 8 (1964), but this Court has never passed on whether the First Amendment also protects such refusal to speak with police. While *Amici* believe the question presented in this case—whether probable cause bars any First Amendment retaliatory arrest claim—is an important one which merits consideration by the Court, it should be decided on a more appropriate set of facts.

check on government. As Justice Black wrote, the Framers of the Constitution "gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government." *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring). When the press performs this vital role, "'the state has a special incentive to repress opposition and often wields a more effective power of suppression.'" *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.11 (1978) (quoting Thomas Emerson, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 9 (1966)). Given this dynamic, the threat of retaliatory arrests without constitutional recourse is particularly chilling, because "law enforcement officials ... are granted substantial discretion that may be misused to deprive individuals of their liberties." *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011).

In the United States, numerous journalists have been subjected to arrest merely for doing their jobs. Although it is rare, newspaper publishers have been rousted from their homes in the middle of the night for exposing government corruption. More frequently, reporters and photographers have been swept up by police as they try to cover public demonstrations or to document various forms of police action. In 2017 alone, 34 journalists were arrested while trying to document or report the news, *see* U.S. PRESS FREEDOM TRACKER, *available at* https://pressfreedomtracker.us/arrest-criminal-charge (last visited Oct. 4, 2018), and in the past

several years, many more have been arrested covering such events as unrest during the presidential inauguration, the Occupy Wall Street demonstrations, confrontations in Ferguson, Missouri, and the Black Lives Matter movement. In almost all of those cases the charges against arrested journalists were either dropped or dismissed, regardless of probable cause.

Where arrests are motivated by hostility to the press or out of a desire to control news coverage, a holding that any probable cause defeats First Amendment protection would endanger vital First Amendment values. Generalized laws aimed at preserving public order—such as disorderly conduct or disturbing the peace—give police virtually uncabined discretion in deciding who should be arrested and who may be allowed to report without interference. This Court has held on numerous occasions that such discretion can be misused and First Amendment protections undermined, particularly where press coverage is unwelcome to those in authority.

If the Court reaches the merits, it should hold that probable cause does not strictly bar claims alleging First Amendment retaliation, and should adopt a standard that appropriately accommodates the needs of law enforcement while adequately preserving constitutional protections for free speech and press. Such a test was articulated in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), where, once a plaintiff has shown a censorial motive, the burden shifts to the government to show it would have taken the same action

regardless. Such an approach preserves police officers' ability to raise probable cause as a defense, but it does not extinguish First Amendment claims when government actors purposefully target members of the press.

ARGUMENT

I. FREEDOM OF THE PRESS IS AT RISK IF PROBABLE CAUSE SERVES AS AN ABSOLUTE BAR TO FIRST AMENDMENT RETALIATION CLAIMS

While *Amici* recognize that the case at bar does not concern press freedoms – and indeed only arguably presents a colorable First Amendment retaliation claim – both parties contend that the question presented is whether probable cause acts as a complete bar to *any* First Amendment retaliation claim under 42 U.S.C. § 1983. *See* Pet. Br. at i; Resp. Br. at i. Because members of the press are uniquely affected by police and government retaliation against their First Amendment-protected activities, the answer to this question will have an immediate, significant, and lasting impact upon *Amici*.

Because the very purpose of a free press is to act as a restraint on runaway governmental power in our system of checks and balances, it is commonplace for those who exercise that power to take offense. Such hostility to the press is not new, nor is it confined to any political party or level of government. The Obama Administration prosecuted more people for leaks to the press than all previous

presidential administrations combined;[3] President Nixon had his "Enemies List"[4] and approved direct and indirect assaults on the press;[5] Governor George Wallace of Alabama regularly castigated journalists;[6] and Louisiana Governor Huey Long tried to impose a special tax on urban newspapers that he

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[3] Joel Simon, *Barack Obama's Press Freedom Legacy*, COLUMBIA JOURNALISM REVIEW, (April 3, 2015), *available at* https://www.cjr.org/criticism/barack_obamas_press_freedom_legacy.php ("the Obama administration has prosecuted more leakers under the 1917 Espionage Act than all former presidents combined").

[4] List of White House 'Enemies' and Memo Submitted by White House Counsel John Dean to the Ervin Committee, Facts on File, Watergate and the White House, vol. 1, pp. 96-97, *available at* https://www.colorado.edu/AmStudies/lewis/film/enemies.htm (list included political enemies as well as more than 50 newspaper and TV reporters).

[5] James T. Hamilton, *Attacks on the Press Have Helped Bring Down a President Before*, WASHINGTON MONTHLY, (Jan. 12, 2017), *available at* https://washingtonmonthly.com/2017/01/12/nixon-and-trump-past-as-prologue (Nixon "approved illegal wiretaps to listen into the phone conversations of journalists critical of the administration. His Justice Department lodged antitrust charges against the three broadcast networks. He asked FBI Director J. Edgar Hoover to develop 'a run down on the homosexuals known and suspected in the Washington Press Corps.'").

[6] Howell Raines, *George Wallace, Segregation Symbol, Dies at 79*, NEW YORK TIMES, (Sept. 14, 1998), *available at* https://www.nytimes.com/1998/14/us/George-wallace-segregation-symbol-dies-at-79.html (Wallace's "expurgated list of demons" included "liberals, Communists, the Eastern press, Federal judges, [and] 'pointy-headed intellectuals.'").

called a "tax on lying."[7] The current occupant of the White House has branded the press as the "enemy of the American people" and posted videos of himself wrestling an anthropomorphized news network to the ground.[8]

A contentious relationship between government and the press is by design. However, it presents a constitutional problem if the government has at its disposal a legal means of facilitating acts of retaliation, and of defeating efforts to vindicate constitutional rights in court. In particular, news gathering can be disrupted where arrests can be used as a "catch and release" technique, and the press can be chilled into inaction even if there is no prosecution. Such concerns arise in a variety of circumstances.

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[7] Elizabeth Kolbert, *The Big Sleazy*, THE NEW YORKER, (June 12, 2006), *available at* www.newyorker.com/magazine/2006/06/12/the-big-sleazy ("Long proposed (and, of course, got passed) a tax on advertising sales by newspapers with a circulation exceeding twenty thousand. The tax affected primarily the large dailies in New Orleans, which had always opposed him."); *see Grosjean v. American Press Co., Inc.*, 297 U.S. 233, 250 (1936) ("[T]his is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.").

[8] *See, e.g.*, Shelley Hepworth, *Tracking Trump-Era Assault on Press Norms*, COLUMBIA JOURNALISM REVIEW, (May 25, 2017), *available at* https://www.cjr.org/watchdog/tracking-trump-assault-press-freedom-media-attack.php; Michael M. Grynbaum, *Trump, in Latest Bout With Media, Conjures Physical Fight With a Foe*, NEW YORK TIMES, (July 3, 2017) at A10.

A. Retaliation for Unfavorable Press Coverage

In this country, it is rare for a public official to arrest a journalist for publishing a critical story—this is not Russia or Turkey—but it does happen. Sheriff Joe Arpaio of Arizona arrested the publishers of *Phoenix New Times* for publishing articles that probed the sheriff's commercial real estate holdings and that exposed the sheriff's abusive investigation of the newspaper. *Lacey v. Maricopa County*, 693 F.3d 896, 907-09 (9th Cir. 2012) (en banc). As the Ninth Circuit observed, "[i]t is hard to conceive of a more direct assault on the First Amendment than public officials ordering the immediate arrests of their critics." *Id.* at 917.

Sheriff Arpaio shopped around several county prosecutors until he found one willing to investigate the newspaper. A compliant Special Deputy Maricopa County Attorney was appointed who took action against *New Times*, first by sending subpoenas demanding, among other things, information on confidential sources, reporters' and editors' notebooks, memoranda and other documents for any story critical of Arpaio. *Id.* at 909. After *New Times* ran a story revealing the subpoena's demands, Arpaio's "Selective Enforcement Unit" staged a nighttime raid and arrested the publishers in their homes. *Id.* at 910.

The publishers brought a civil rights claim pursuant to 42 U.S.C. § 1983 and the Ninth Circuit denied the defendants' qualified immunity defense. The court did not address the issue raised in this case, whether a probable cause finding would have barred bringing any First Amendment retaliation

claims. 693 F.3d at 917 n.8. Ultimately, it found the arrests were not supported by probable cause. *Id.* at 919. However, if probable cause had existed to make an arrest, then First Amendment retaliation claims arguably would have been entirely barred even on these egregious facts.[9]

In *Reichle v. Howards*, 566 U.S. 658, 668-69 (2012), this Court stopped short of finding that probable cause was sufficient to bar First Amendment claims for retaliatory arrests for good reason. The Court observed that "in many retaliatory arrest cases, it is the officer bearing the alleged animus who makes the injurious arrest." *Id.* If probable cause were all that were needed to bar a First Amendment claim, then officials would be able to retaliate against members of the press with impunity.

B. Arrests While Covering Public Protests or Documenting Police Misconduct

The risk of retaliatory arrest is particularly acute for reporters and news photographers covering public protests or recording police activity. In 2017, at least 34 journalists were arrested while seeking to document or report news. *see* U.S. PRESS FREEDOM TRACKER, *available at*

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[9] Arizona law prohibits unauthorized disclosure of matters relating to a grand jury proceeding, and *New Times* had published the substance of the subpoenas that had been issued pursuant to Arpaio's retaliatory investigation. However, the court held that probable cause was lacking because the subpoenas had not been validly issued as part of a grand jury proceeding. *Lacey*, 693 F.3d at 918-19. *See id.* at 923-24.

https://pressfreedomtracker.us/arrest-criminal-charge (last visited Oct. 4, 2018). The few examples provided below illustrate that it is not uncommon for police officers to arrest journalists for attempting to gather news from the midst of civil unrest, or for persistently asking questions of public officials or videotaping police as they perform duties in public.

Large-scale protests have become a defining feature of the last five years in the life of this nation, but dubious arrests have greatly hindered the ability of journalists "on the ground" to provide the public a much-needed window onto scenes of civil unrest. For instance, in early 2017, police arrested nine journalists covering the violent protests that attended President Trump's inauguration. *See* Jaclyn Peiser, *Journalist Swept Up in Inauguration Day Arrests Faces Trial*, NEW YORK TIMES (Nov. 14, 2017), *available at* https://www.nytimes.com/2017/11/14/business/media/alexei-wood-journalist-trial-inauguration.html. Prosecutors ultimately dropped the charges against seven of the nine journalists. One of *Amicus* NPPA's members was also arrested while covering that inauguration day protest. His cameras, film, and digital media files were seized, preventing those images from being timely published, and effecting a prior restraint on the materials. It was not until months later that prosecutors dropped all charges and returned most (but not all) of his equipment and digital files. *See* Tom Burton, *Photojournalists Arrested at Protests Work to Have Confiscated Gear Returned*, NPPA.ORG (Mar. 3, 2017), *available at* https://nppa.org/news/confiscated-cameras-returned. *See also* Sarah Matthews, PRESS FREEDOM TRACKER, *Press Freedoms*

in the United States 2017 at 4 (March 27, 2018), *available at* https://www.rcfp.org/sites/default/files/docs/20180403_100407_press_freedoms_in_the_us_2017.pdf (reporting that "85 percent of arrests [of journalists in 2017] occurred at protests").

These kinds of "catch and release" arrests are not unusual. Officers arrested a number of reporters covering Black Lives Matter protests in Ferguson and St. Louis, Missouri, including reporters for the *Washington Post* and *Huffington Post*, leading to dropped charges in each case. Nirajj Chokshi, *Ferguson-related charges dropped against Washington Post and Huffington Post reporters*, WASH. POST (May 19, 2016), *available at* https://www.washingtonpost.com/news/post-nation/wp/2016/05/19/ferguson-related-charges-dropped-against-washington-post-and-huffington-post-reporters/?utm_term=.c18183a7914a.

Between 2011 and 2012, more than 90 journalists were arrested while reporting at Occupy Wall Street protests that occurred around the country. Tasneem Raja, *Tracking Journalists Arrested at Occupy Protests*, MOTHER JONES (Nov. 18, 2011), *available at* https://www.motherjones.com/politics/2011/11/tracking-journalists-arrests-occupy-protests; *see also*, Sara Rafsky, *At Occupy Protests, U.S. Journalists Arrested, Assaulted*, COMM. TO PROTECT JOURNALISTS, (Nov. 11, 2011), *available at* http://bit.ly/2i2Mblp. A judge in North Dakota dismissed riot charges for lack of evidence after a radio journalist was arrested while covering protests against the Dakota Access pipeline. Erin McCann, *Judge Rejects Riot Charge against Amy Goodman of*

'Democracy Now' Over Pipeline Protest, NEW YORK TIMES (Oct. 17, 2016), *available at* https://www.nytimes.com/2016/10/18/us/judge-rejects-riot-charge-against-amy-goodman-of-democracy-now-over-pipeline-protest.html. By retaliating against journalists, the police can—and all too often do—prevent journalists from reporting events occurring at the front lines of public protests, where violent confrontations with police are most likely to occur, and where press scrutiny is most needed.

Dubious arrests also have prevented journalists from tenaciously questioning government officials in public places. On May 9, 2017, a reporter was arrested in the West Virginia State Capitol building for shouting questions at the Secretary of the Department of Health and Human Services, Tom Price, as he walked through a public hallway with Counselor to the President of the United States, Kellyanne Conway. The reporter was charged with willful disruption of governmental processes, but this charge was dropped after prosecutors determined no crime had been committed. Matt Stevens, *Charge Dropped against Reporter Who Questioned Tom Price*, NEW YORK TIMES (Sept. 6, 2017), *available at* https://www.nytimes.com/2017/09/06/business/media/tom-price-journalist-arrest.html.

Photojournalists are particularly vulnerable to retaliatory arrests when filming police activity in public. In one instance, a news photographer was acquitted of disorderly conduct after being thrown to the ground and arrested for unobtrusively photographing police officers assisting the issuance of

liquor citations to two men. *See* Andrew Metcalf, BETHESDA MAG. (Mar. 8, 2017), *Montgomery County Settles First Amendment Lawsuit with Photographer, available at* http://www.bethesdamagazine.com/Bethesda-Beat/2017/Montgomery-County-Settles-First-Amendment-Lawsuit-with-Photographer. In another case, Detroit Police arrested a press photographer after she photographed officers escorting a suspect into a police car and confiscated her phone, although no charges were ever filed. WWJ/AP, *Freep Photographer Arrested While Recording An Arrest*, CBSLOCAL.COM (July 16, 2013), *available at* https://detroit.cbslocal.com/2013/07/16/freep-photographer-arrested-while-recording-an-arrest/. In yet another instance, a credentialed Long Island news videographer was arrested and charged with obstructing governmental administration for videotaping police activity from a public street in the midst of other bystanders. Steve Myers, *News Photographer Arrested on Long Island for Videotaping Police*, POYNTER, (Aug. 2, 2011), *available at* http://bit.ly/2i2zBmi (noting that the charge was later dropped). In August of 2012, a photographer on assignment for *The New York Times* was arrested and charged with obstructing government administration and resisting arrest for photographing the arrest of a teenage girl in the Bronx. *Times Photographer Is Arrested on Assignment*, NEW YORK TIMES, (Aug. 5, 2012), *available at* http://nyti.ms/ 2hk8W4U. Recently, Denver police officers arrested the editor of the *Colorado Independent* for taking photographs of those officers standing by a naked man whom they had handcuffed on a city sidewalk. Elise Schmelzer, *Denver Officer*

Accused of Detaining Colorado Journalist Faces No Charges, DENVER POST, (Aug. 23, 2018), *available at* https://www.denverpost.com/2018/08/23/denver-police-detained-journalist-no-charges/.[10]

Arrests such as these thwart the well-established First Amendment right to record police activity in public, which is a crucial function journalists perform in order to ensure that the police remain accountable to the public they serve.[11] All told, the risk of police interference with and arrest of

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[10] Retaliatory arrests are not limited to police officers trying to stop the filming of their own activities. Press photographers and videographers also have been arrested for unwelcome attempts to record public hearings and events. *See, e.g.*, Tom Sherwood, *Journalists Handcuffed, Removed from Taxi Commission Meeting*, NBC4 WASHINGTON (June 22, 2011), *available at* http://bit.ly/2h9JeLD; Matt Hamilton, *L.A. Times Photographer Arrested After Covering Nancy Reagan Funeral Motorcade*, L.A. TIMES, (March 9, 2016), *available at* http://lat.ms/1QFntAG; Tim Perry, *CBS News Journalist Relives His Arrest at a Chicago Trump Event*, CBSNEWS.COM, (Nov. 14, 2016), *available at* http://cbsn.ws/2i0ihvJ.

[11] *E.g.*, *Glik*, 655 F.3d at 82-83 ("Ensuring the public's right to gather information about their officials not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally.") (internal citations omitted). *See also Turner v. Lieutenant Driver*, 848 F.3d 678, 689 (5th Cir. 2017) ("Filming the police contributes to the public's ability to hold the[m] accountable, ensure that [] officers are not abusing their power, and make informed decisions about police policy."). "Every Circuit Court of Appeals to address this issue (First, Fifth, Seventh, Ninth, and Eleventh) has held there is a First Amendment right to record police activity in public" and "we join this growing consensus." *Fields v. City of Philadelphia*, 862 F.3d 353, 355-56 (3d Cir. 2017) (collecting cases).

journalists performing their duties is not an esoteric or hypothetical concern.

II. THE COURT SHOULD ADOPT A STANDARD THAT APPROPRIATELY BALANCES THE NEEDS OF LAW ENFORCEMENT WITH FIRST AMENDMENT VALUES

A. The Power to Make Arrests Can Disrupt Newsgathering and Other First Amendment Activities

The power to make arrests is the state's most direct and tangible limit on individual liberty. The impact of its misuse is magnified when employed to retaliate against and deter protected speech. When it comes to the press, arrests can be used to disrupt the exercise of First Amendment speech and press rights. Any retaliatory arrest immediately halts newsgathering activity and contemporaneous reporting of events. The cost, time commitment, effort and distraction imposed on journalists and press organizations to address the fallout of arrests also detract from reporting activity.

Such interference with reportage cannot be remedied in full by *post hoc* remedies. *See, e.g., In re King World Prods., Inc.*, 898 F.2d 56, 59 (6th Cir. 1990) ("even minimal interference with first amendment freedoms causes an irreparable injury") (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)). However, the ability to bring civil rights claims can help ameliorate these burdens and provide much-needed deterrence of police misconduct—provided, of course, that presence of probable cause to arrest is

not a bar to doing so. It is particularly important that a potential First Amendment remedy be available where the government may attempt to dissuade reporters or photographers from covering events where there exists the possibility of public disorder and clashes between citizens and police.

In such circumstances, the police may be tempted to invoke general laws such as breach of peace (*i.e.*, disorderly conduct), obstructing public ways, failure to comply with a peace officer, or loitering to justify arrests, particularly where there may be unfavorable press coverage. Arrests based on probable cause for violating offenses of such generalized and broad scope can be especially threatening to First Amendment activities as they are "susceptible to abuses of discriminatory application." *E.g.*, *Cox v. Louisiana*, 379 U.S. 536, 551, 554-55 (1965). *See also Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 93 (1965) (amorphous offenses become "so broad as to evoke constitutional doubt of the utmost gravity").

With the breadth of such laws and the ease of asserting probable cause for their violation, minor offenses can easily be used as a pretext for a speech-halting arrest. As a consequence, the "lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not." *Cox*, 379 U.S. at 557. This creates "a device for the suppression of the communication of ideas and permits the official to act as a censor." *Id.* If the presence of asserted probable cause for such offenses were sufficient to serve as an absolute bar to First Amendment claims,

law enforcement would have far too much leeway to curtail protected expression.[12]

Indeed, the United States Department of Justice has noted that these kinds of "discretionary charges, such as disorderly conduct, loitering, disturbing the peace, and resisting arrest, are all too easily used to curtail expressive conduct or retaliate against individuals for exercising their First Amendment rights," such that "courts should view such charges skeptically." Dep't of Justice Statement of Interest, *Garcia v. Montgomery County*, 2013 WL 4539394 (D. Md. Aug. 23, 2013), No. JFM-12-3592, at 1. *See also Patterson v. United States*, 999 F. Supp. 2d 300, 314 (D.D.C. 2013) (citing propensity of "'contempt of cop' arrests" and "widespread practice of [] officers using [] disorderly conduct law to arrest ... without a legitimate basis").

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[12] This Court has recognized the need to limit such discretion in numerous cases. *See, e.g., City of Houston, TX, v. Hill*, 482 U.S. 451, 465 (1987) ("we have repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them"); *Kolender v. Lawson*, 461 U.S. 352, 360-61 (1983) (identification requirement unconstitutional because it accords police "full discretion"); *Smith v. Goguen*, 415 U.S. 566, 575 (1974) ("Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections" thereby "entrusting lawmaking 'to the moment-to-moment judgment of the policeman on his beat'") (quoting *Gregory v. Chicago*, 394 U.S. 111 (1969) (Black, J., concurring)); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (vagrancy ordinance "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure'") (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940)).

Such concerns are magnified if the police can try to justify an arrest after-the-fact with "arguable probable cause." Here, for example, at the time of the arrest the officers told Bartlett that he was under arrest for harassment. The State never charged him with harassment, however, instead, charging him with disorderly conduct and resisting or interfering with arrest—before ultimately dropping all charges. Pet. App. 12-14. In *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945 (2018), the state likewise switched theories on what law Lozman supposedly had violated and for which they had probable cause for his arrest midway through the trial. *See id.* at 1950 (district court allowed defendants to raise a previously unraised charge). Similarly, in *Garcia*, although the plaintiff had been arrested (and acquitted) on charges of disorderly conduct, in the ensuing civil litigation the police claimed they should not be held to account on the theory that probable cause might have existed to bring other charges.[13] While retaliatory *prosecution* cases have a charging instrument that governs any probable cause inquiry, as *Garcia* illustrates, arresting officers are not similarly constrained, *see Garcia*, 145 F. Supp. 3d at 519 (citing *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004)), and Section 1983 law enforcement defendants are thus free to "move the goalposts" in ensuing civil litigation for retaliatory arrests.

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[13] *Garcia*, 145 F. Supp. 3d 492, 517-21 (D. Md. 2015) (rejecting County theories in ensuing civil case that arrest was justified by probable cause for hindering arrest of third parties and/or second degree assault, as lacking objectively reasonable bases).

The great latitude officers enjoy to make arrests where they can cite *something*—anything—that serves as probable cause is unduly magnified if legal recourse is blocked by such recitation; this creates the wrong kinds of incentives. Under qualified immunity principles, officers already are immunized from potential liability except where they knowingly violate clearly established constitutional rights, *Malley v. Briggs*, 475 U.S. 335, 341 (1986)—and this immunity extends to arrests made without probable cause, *see Reichle*, 566 U.S. at 664-65. So too, law enforcement agencies cannot be held liable unless an unlawful arrest is pursuant to department custom or policy. *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). For cases that clear these hurdles, holding that probable cause to arrest defeats a First Amendment claim further contracts the ability of the press and public to remedy constitutional violations.

This leaves journalists, photographers, citizen reporters and others with even less opportunity to vindicate their rights. It also instructs law enforcement officers that, even if they know they are violating well-settled rights, no liability will attach so long as they can articulate some probable cause for arrest, even after the fact. This, in turn, emboldens police to make constitutionally infirm arrests and disincentivizes law enforcement agencies from properly training and disciplining their officers. Altogether, these factors increase the incidence of arrests that interfere with the exercise of basic First Amendment rights.

B. The Burden Shifting Framework of *Mt. Healthy City School District Board of Education v. Doyle* Strikes the Correct Constitutional Balance

Under longstanding First Amendment analysis, the government has no legitimate power to retaliate against individuals for engaging in constitutionally protected activity. Public schools may not fire teachers for criticizing administrators, *Perry v. Sindermann*, 408 U.S. 593 (1972); prison officials may not divert prisoners' mail as punishment for speaking to the press, *Crawford-El v. Britton*, 523 U.S. 574 (1998); and agencies may not demote employees for their political affiliations. *Heffernan v. City of Paterson*, 136 S. Ct. 1412 (2016). Bottom line, official reprisal for protected activity "offends the Constitution," *Crawford-El v. Britton*, 523 U.S. at 588 n.10, and is subject to recovery, *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

At the same time, the Court has long been sensitive to the potential for retaliation lawsuits to hamstring effective administration of government. Permitting recovery whenever government action is motivated in any part by improper animus risks preventing the government from acting in the public interest. *Mt. Healthy*, 429 U.S. at 285. A school administration should not be disabled from terminating an underperforming teacher just because he (or she) happens to engage in protected speech with which the administration disagrees. *Id.*

So too has the Court acknowledged the costs of the unique evidentiary burdens retaliation claims place on public officials. Improper animus is "easy to

allege and hard to disprove." *Crawford-El*, 523 U.S. at 585. Retaliation suits therefore may be less amenable to summary disposition and "implicate obvious concerns with the social costs of subjecting public officials to discovery and trial, as well as liability for damages." *Id.*

To address these problems, this Court long ago fashioned a burden-shifting framework designed to "protect[] against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights." *Mt. Healthy*, 429 U.S. at 287. Under the *Mt. Healthy* test, the plaintiff bears the initial burden of demonstrating unconstitutional animus was a motivating factor of an adverse action; the burden then shifts to the defendant to demonstrate that even without the impetus to retaliate the defendant would have taken the action complained of. *Id.*

The *Mt. Healthy* test strikes the appropriate constitutional balance for the vast majority of retaliation claims. In effect, it narrows availability of recovery to cases where unconstitutional animus is the but-for cause of official action and ensures that defendants have an adequate opportunity to defend against frivolous claims at summary judgment. Most importantly, it ensures that an individual "is placed in no worse a position than if he had not engaged in the [protected] conduct." *Id.* at 285-86.

The *Mt. Healthy* test is particularly appropriate in First Amendment retaliatory arrest cases and neatly affords the presence or absence of probable cause due evidentiary weight. No doubt, officers offend the Constitution whenever they arrest an

individual in order to inhibit or penalize the exercise of First Amendment freedoms. That is true regardless of whether there exists probable cause, if the arrest would not have occurred but for the protected activity. *Cf. Mt. Healthy*, 429 U.S. at 283-84 (even when a public employee may be discharged for no reason, the government may not discharge the employee because of their protected speech); *Perry*, 408 U.S. at 597 (the government may not deny plaintiff a benefit because of his protected speech, even if it could properly deny it for another reason).

Evidence of the presence or absence of probable cause to arrest will be available to officers in "virtually every retaliatory arrest case," *Reichle*, 566 U.S. at 668, and an officer may raise it as a defense to any claim of retaliation. Indeed, the increased availability of video evidence, from police-worn body cameras, dashcams, surveillance video or bystanders who can record audio and/or video with cellphones, only strengthens the evidence that will be available to arresting officers. "Nearly every large police department" has either adopted police-worn body cameras or plans to.[14] More than three-quarters of Americans own a smartphone, which contain video-capable cameras as a matter of course.[15]

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[14] Mike Maciag, *Survey: Almost All Police Departments Plan to Use Body Cameras*, GOVERNING (Jan. 26. 2016), *available at* http://www.governing.com/topics/public-justice-safety/gov-police-body-camera-survey.html.

[15] *Mobile Fact Sheet*, PEW RESEARCH CTR. (Feb. 5, 2018), *available at* http://www.pewinternet.org/fact-sheet/mobile.

This widely available documentary evidence makes summary judgment dispositions significantly more likely. More than a decade ago, in *Scott v. Harris*, the Court explicitly held that a video documenting the events giving rise to a Section 1983 claim entitled the defendant police officer to summary judgment, notwithstanding the claimant's divergent statement of the facts. 550 U.S. 372, 380-81 (2007). Federal Courts of Appeals ruling on First Amendment retaliation claims have also recognized the exculpatory potential of video evidence as one of the broader public benefits served by its proliferation. *See Turner*, 848 F.3d at 689 ("Filming the police also frequently helps officers; for example, a citizen's recording might corroborate a probable cause finding or might even exonerate an officer charged with wrongdoing"). *See also Glik*, 655 F.3d at 82-83 (the ability to record police "serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs," and "not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally.") (citations and quotation marks omitted).[16]

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[16] Chief Justice Roberts recognized the potent evidentiary value of videography in First Amendment retaliation claims during oral argument in *Lozman*, commenting on a video of the petitioner's alleged unlawful arrest: "[R]egardless of what happened before or after, I found the video pretty chilling. I mean, the fellow is up there for about 15 seconds, and the next thing he knows, he's being led off in -- in -- in handcuffs, speaking in a very calm voice the whole time." Transcript of Oral Argument at 34:15-21, *Lozman*, 138 S. Ct. 1945 (No. 17-21).

The increasingly widespread availability of exculpatory video evidence may be "fatal" to many plaintiffs' ability to prove the requisite but-for causation element of a retaliatory arrest claim. *Reichle*, 566 U.S. at 668. And, where appropriate, courts presented with clear evidence will have little difficulty resolving claims at an early stage. In fact, only a few months ago the Second Circuit held that applying the *Mt. Healthy* standard would still require affirming summary judgment to a police officer in a Section 1983 retaliatory arrest claim, where the record could not support the plaintiff's claim that his First Amendment-protected activity was a "but-for" cause of his arrest. *See Higginbotham v. Sylvester*, No. 16-3994, 2018 WL 3559116, at *2 (2d Cir. July 25, 2018). Any concern that *Mt. Healthy* would open the "floodgates" of retaliatory arrest litigation is therefore misplaced. Under the *Mt. Healthy* framework, arrestees, like public employees, are left in no worse a position than if they had not engaged in protected conduct.

In contrast, requiring arrestees to demonstrate an absence of probable cause would decisively tip the scales in favor of defendants, enabling police to indirectly censor and penalize the exercise of First Amendment freedoms in ways the government could not directly command. A rule that probable cause bars a retaliatory arrest claim would immunize government actions that plainly offend the First Amendment.

That probable cause would bar a Fourth Amendment challenge is irrelevant. The Court already has made clear that an arrest which is lawful under the

Fourth Amendment may nevertheless violate other constitutional rights. In *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, this Court acknowledged that the *Mt. Healthy* test governs retaliation claims premised on alleged racial discrimination. 429 U.S. 252, 270, n.21 (1977). And in *Whren v. United States*, it clarified that the Constitution prohibits selective law enforcement based on race, notwithstanding the existence of probable cause. 517 U.S. 806, 813 (1996); *see Reichle*, 566 U.S. at 664 n.5. If the existence of probable cause is no bar to an Equal Protection challenge to an arrest, it should not bar a First Amendment challenge.

Notably, retaliatory arrest claims feature none of the attributes of retaliatory prosecution claims that left this Court comfortable in imposing the burden of alleging and proving lack of probable cause in retaliatory *prosecution* claims in *Hartman*, 547 U.S. 250. Unlike retaliatory prosecution plaintiffs (and retaliatory arrest defendants), retaliatory arrest plaintiffs do not always have access to a distinct body of highly valuable circumstantial evidence that is apt to prove or disprove probable cause, because retaliatory arrest plaintiffs often do not even know the reason for their arrest. *See Devenpeck*, 543 U.S. at 155 (police officers not constitutionally required to state reasons for an arrest). More importantly, in contrast to retaliatory prosecution claims, there is generally no disconnect between animus and injury in retaliatory arrest claims—"it is the officer bearing the alleged animus who makes the injurious arrest." *Reichle*, 566 U.S. at 668-69. Nor is any presumption of regularity accorded police officers' arrest decisions

that is akin to the presumption of prosecutorial regularity. *Id.*

For these reasons, First Amendment retaliatory arrest claims are best adjudicated under the standard *Mt. Healthy* rubric, and should not invariably be defeated by a failure to allege and then prove a lack of probable cause. The *Mt. Healthy* standard preserves police officers' ability to raise probable cause as a defense while ensuring they are not insulated from liability for purposefully abridging and penalizing the exercise of the freedoms guaranteed by the First Amendment.

CONCLUSION

The arrests of reporters and photographers described in this brief "may have taken place in America," but they belong "to a society much different and more oppressive than our own." *Rossignol v. Vookhaar*, 316 F.3d 516, 527-28 (4th Cir. 2003). The Court should adopt a legal standard that makes clear it is "not for law enforcement to summon the organized force of the sheriff's office to the cause of censorship." *Id.* at 528. Toward that end, this Court should affirm the decision below and hold that probable cause does not bar First Amendment claims for retaliatory arrests.

Respectfully submitted,

Robert D. Balin
Counsel of Record
Abigail B. Everdell
Davis Wright Tremaine LLP
21st Floor
1251 Avenue of the Americas
New York, New York 10020-1104
(212) 489-8230

Charles S. Sims
Media Freedom &
Information Access Clinic
Yale Law School
P.O. Box 208215
New Haven, CT 06520

Mickey H. Osterreicher
National Press Photographers
Association
120 Hooper Street
Athens, Georgia 30602

Counsel for *Amici Curiae*

APPENDIX A

American Society of News Editors ("ASNE") is an organization with some 500 members, that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York, and owned by its 1,500 U.S. newspaper members. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 300 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

The Associated Press Media Editors ("APME") is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the principles and practices of responsible journalism; supports and mentors a diverse network of current and emerging newsroom leaders; and champions the

First Amendment and promotes freedom of information

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

The Association of Magazine Media ("MPA") is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover news, culture, sports, lifestyle, and virtually every interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The Brechner Center for Freedom of Information ("Brechner Center") exists to advance understanding, appreciation and support for freedom of information in the state of Florida, the nation and the world. Since its founding in 1977, the Brechner Center has served as a source of academic research and expertise about the law of gathering and sharing information, and the Center regularly appears as a friend-of-the-court in federal and state appellate cases nationwide where the public's right

to informed participation in government is at stake. The Center is exercising the academic freedom of its faculty to express their scholarly views, and is not submitting this brief on behalf of the University of Florida or the University of Florida Board of Trustees.

Buzzfeed is a social news and entertainment company that provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million.

The California News Publishers Association ("CNPA") is a nonprofit trade association representing the interests of over 1,300 daily and weekly newspapers founded in 1888. CNPA has a substantial interest in cases pertaining to the First Amendment protection of journalists. CNPA regularly appears as amicus to protect the newsgathering process for journalists in California and promote freedom of speech and of the press guaranteed by the First Amendment of the United States Constitution and Article 1, Section 2 of the California Constitution

The Center for Investigative Reporting ("CIR"), founded in 1977, is the nation's oldest nonprofit investigative newsroom. CIR produces investigative journalism for its website hhtp://revealnews.org, the Reveal national public radio show and podcast, and various documentary projects. CIR often works in collaboration with other newsrooms across the country.

MediaNews Group Inc., dba Digital First Media, publishes the San Jose Mercury News, the East Bay Times, St. Paul Pioneer Press, The Denver Post and the Detroit News and other community papers throughout the United States, as well as numerous related online news sites.

The E.W. Scripps Company serves audiences and businesses through television, radio and digital media brands, with 33 television stations in 24 markets. Scripps also owns 34 radio stations in eight markets, as well as local and national digital journalism and information businesses, including mobile video news service Newsy and weather app developer WeatherSphere. Scripps owns and operates an award-winning investigative reporting newsroom in Washington, D.C. and serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

The Electronic Frontier Foundation ("EFF") is a member-supported, nonprofit civil liberties organization that works to protect free speech and privacy in the digital world. Founded in 1990, EFF has over 37,000 members. EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law to technology. EFF has filed amicus briefs on many First Amendment issues involving the use of digital technologies by professional and citizen journalists to gather and disseminate the news. *See Fields v. City of Philadelphia*, No. 16-1650 (3d Cir.).

First Look Media Works, Inc. is a new non-profit digital media venture that produces The *Intercept*, a digital magazine focused on national security reporting.

Freedom to Read Foundation is an organization established by the American Library Association to promote and defend First Amendment rights, foster libraries as institutions that fulfill the promise of the First Amendment, support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and establish legal precedent for the freedom to read of all citizens.

Gannett Co., Inc. is a leading media company which publishes USA TODAY and 109 local media sites in 34 states and Guam through a variety of affiliated digital, mobile and print products. Each month more than 125 million unique visitors access content from USA TODAY and Gannett's local media organizations, putting the company in the Top 10 U.S. news and information category. Gannett's local newspapers add an additional audience of 6 million readers every weekday, and USA TODAY adds 2.4 million daily.

The International Documentary Association ("IDA") is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

Los Angeles Times Communications LLC is one of the largest daily newspapers in the United States. Its popular news and information website, www.latimes.com, and app attract audiences throughout California and across the nation.

Media Coalition Foundation, Inc. is a non-profit organization, which works to protect the First Amendment and the public's right to access the broadest possible range of information, opinion and entertainment. The Foundation monitors potential threats to freedom of speech and engages in education and litigation to protect free speech rights.

The Media Institute is a nonprofit research foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism community. Since its founding in 1946, the NPPA has been the *Voice of Visual Journalists*, vigorously promoting the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

New York State Broadcasters Association, Inc. is a not for profit trade association representing more than 400 radio and television stations throughout the state of New York. Providing news and information to the citizens of New York State is a cornerstone of our public interest obligation to serve our local communities. In order to fulfill this vital role under the First Amendment, The New York State Broadcasters Association, Inc. has a direct interest in ensuring that its members are able to obtain access to information.

Online News Association ("ONA") is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual

Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

PEN American Center ("PEN America") is a non-profit association of writers that includes novelists, journalists, editors, poets, essayists, playwrights, publishers, translators, agents, and other professionals. PEN America stands at the intersection of literature and human rights to protect open expression in the United States and worldwide. We champion the freedom to write, recognizing the power of the word to transform the world. Our mission is to unite writers and their allies to celebrate creative expression and defend the liberties that make it possible, working to ensure that people everywhere have the freedom to create literature, to convey information and ideas, to express their views, and to make it possible for everyone to access the views, ideas, and literatures of others. PEN America has approximately 5,000 members and is affiliated with PEN International, the global writers' organization with over 100 Centers in Europe, Asia, Africa, Australia, and the Americas.

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to broadcast and digital journalism. RTDNA is made up of network and local news executives, news directors, other newsroom professionals, journalism

educators and students in radio, television, cable and digital media. RTDNA is committed to encouraging excellence in the journalism industry and upholding First Amendment freedoms.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment and Freedom of Information Act litigation since 1970.

Reporters Without Borders ("RSF") has been fighting censorship and supporting and protecting journalists since 1985. Activities are carried out on five continents through its network of correspondents in 130 countries, 13 offices worldwide, and its close collaboration with local and regional press freedom groups.

Society of Professional Journalists ("SJP") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper The Seattle Times, together with The Issaquah Press, Yakima Herald-Republic, Walla Walla Union-Bulletin, Sammamish Review and Newcastle-News, all in Washington state.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

The Washington Post (formally, WP Company LLC d/b/a The Washington Post) is a news organization based in Washington, D.C. It publishes *The Washington Post* newspaper and the website www.washingtonpost.com, and produces a variety of digital and mobile news applications. The Post has won 47 Pulitzer Prizes for journalism, including awards in 2018 for national and investigative reporting.

No. 17-1174

In The
Supreme Court of the United States

LUIS A. NIEVES and BRYCE L. WEIGHT,

Petitioners,

v.

RUSSELL P. BARTLETT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* SUPPORTING RESPONDENT

JOHN W. WHITEHEAD
DOUGLAS R. MCKUSICK
THE RUTHERFORD INSTITUTE
923 Gardens Blvd.
Charlottesville, VA 22901
(434) 978-3888

ERIN GLENN BUSBY
Counsel of Record
LISA R. ESKOW
727 East Dean Keeton St.
Austin, TX 78705
(713) 966-0409
ebusby@law.utexas.edu

October 9, 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICUS CURIAE*[1]

Amicus The Rutherford Institute, a nonprofit civil-liberties organization, is deeply committed to protecting the constitutional freedoms of every American and the fundamental human rights of all people. The Rutherford Institute advocates for protection of civil liberties and human rights through *pro bono* legal representation and public education on a wide spectrum of issues affecting individual freedom in the United States and around the world.

As a central part of its mission, The Rutherford Institute advocates against government infringement of citizens' rights to freely express themselves, seeking redress in cases where citizens have faced retaliation for exercising their First Amendment right to free speech. To ensure the vitality of the First Amendment, The Rutherford Institute believes that the existence of probable cause should not bar recovery in cases where citizens would not have been arrested but for engaging in constitutionally protected speech. Instead, the Court should confirm that the burden-shifting approach set out in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977), strikes the proper balance between the right to freedom of speech and the right of officers to make legitimate arrests that

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[1] Letters expressing the parties' consent to the filing of *amicus* briefs have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

merely coincide with, but are not motivated by, an individual's exercise of First Amendment rights.

SUMMARY OF THE ARGUMENT

The history of the enactment of the First Amendment and its modern interpretation by this Court both underscore the essential role of freedom of speech as a bulwark against tyranny. As the Court reaffirmed last term, free speech "is essential to our democratic form of government, and it furthers the search for truth." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2464 (2018) (citations omitted). "Whenever the Federal Government or a State prevents individuals from saying what they think on important matters . . . it undermines these ends." *Id.*

Yet that is precisely the danger petitioners' proposed test invites, enhancing the government's ability to silence speech by insulating retaliatory arrests from review whenever there is probable cause to believe the speaker also has committed a crime of any kind. *See* Pet. Br. 16 ("To maintain a damages claim for retaliatory arrest in violation of the First Amendment, a plaintiff must plead and prove the absence of probable cause for the arrest."). Rather than allowing the existence of probable cause to eradicate retaliatory-arrest claims, as petitioners advocate, probable cause should be balanced against the speaker's right to freedom of speech through the

traditional, burden-shifting framework articulated by this Court in *Mt. Healthy*, 429 U.S. at 287. The probable-cause-based exception to *Mt. Healthy* recognized in *Hartman v. Moore*, 547 U.S. 250, 265 (2006), is uniquely suited to retaliatory-prosecution claims and should not be imported into the distinct context of retaliatory arrests.

In departing from the traditional *Mt. Healthy* framework and adding a no-probable-cause element to retaliatory-prosecution claims, this Court in *Hartman* cited practical and legal characteristics that inhere in prosecutions, *id.* at 259-65, but do not exist in the distinct context of arrests. While prosecutors enjoy a presumption of regularity in their prosecutorial discretion, *see id.* at 263, officers are granted no such presumption in connection with arrests. And a retaliatory arrest does not present the complicated causation issues inherent in a prosecution allegedly induced by the animus of an actor other than the prosecutor. *See id.* at 261-63. Additionally, the scope of the probable-cause element in a retaliatory-prosecution case is limited by the crime documented in the charging instrument underlying the prosecution, *see id.* at 261, whereas defendants in retaliatory-arrest cases would not be limited by that constraint.

In light of the wide array of arrestable offenses—including commonplace crimes like jaywalking and littering—it would not be difficult for officers to target speakers for their speech and then insulate the arrests from challenge by pointing to some misdemeanor offense for which probable cause arguably existed.

Because the existence of probable cause, alone, would require dismissal of a retaliatory-arrest claim under petitioners' proposed rule, *e.g.*, Pet. Br. at 16, it would not matter if the crime for which probable cause existed did not actually motivate the arrest; and it would not matter if the person arrested did not actually *commit* that crime. Speakers would have no avenue for redressing retaliatory arrests under petitioners' approach, the purpose of § 1983 would be defeated, and valuable speech would be chilled.

To ensure that freedom of speech continues to serve its vital role in our democracy, the Court should decline petitioners' invitation to create a per se, probable-cause barrier to retaliatory-arrest claims. The *Mt. Healthy* framework already successfully balances the interests of speakers and governmental actors when animus-based claims arise in a wide variety of constitutional contexts, and neither the legal nor practical realities of retaliatory-arrest claims require an exception to that longstanding rule.

ARGUMENT

I. LIMITING THE REDRESSABILITY OF ARRESTS MADE IN RETALIATION FOR PROTECTED SPEECH WOULD UNDERMINE THE PURPOSE OF THE FIRST AMENDMENT.

The probable-cause test proposed by petitioners would significantly limit the ability of speakers to hold

officers accountable for unconstitutional retaliation whenever an officer has probable cause to arrest a speaker for any offense, even if it can be shown that the officer would not have made an arrest were it not for unconstitutional animus. A lack of redress for such an arrest both removes an incentive for officers to avoid retaliation and chills the speech of those who will fear arrest. That result cannot be squared with the purpose of the First Amendment and the vital role of speech in the American democratic system.

The Founders created a government where power was derived solely from the people, who possessed absolute sovereignty. JAMES MADISON, THE VIRGINIA REPORT OF 1799-1800, *reprinted in* VIRGINIA GENERAL ASSEMBLY HOUSE OF DELEGATES, THE VIRGINIA REPORT OF 1799-1800, TOUCHING THE ALIEN AND SEDITION LAWS; TOGETHER WITH THE VIRGINIA RESOLUTIONS OF DECEMBER 21, 1798, INCLUDING THE DEBATE AND PROCEEDINGS THEREON IN THE HOUSE OF DELEGATES OF VIRGINIA AND OTHER DOCUMENTS ILLUSTRATIVE OF THE REPORT AND RESOLUTIONS 196 (Leonard W. Levy ed., Da Capo Press 1970) (1850) [hereinafter "THE VIRGINIA REPORT"]. This popular sovereignty necessitated that people remain free to criticize the government. *See id.* As Benjamin Franklin put it, "[f]reedom of speech is a principal pillar of a free government; when this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins." BENJAMIN FRANKLIN, *On Freedom of Speech and the Press*, PA. GAZETTE (Nov. 1737), *reprinted in* 2 BENJAMIN FRANKLIN, MEMOIRS OF BENJAMIN FRANKLIN 431 (1840).

According to Franklin, speech provided the citizenry's check on the government—"[r]epublics and limited monarchies derive their strength and vigor from a popular examination into the action of the magistrates." *Id.* (cautioning that "an evil magistrate intrusted with power *to punish for words* would be armed with a weapon the most destructive and terrible").

The same recognition of the importance of freedom of speech as a means of preventing tyranny can be found in state constitutions from the time of the Nation's founding. *See* PA. CONST. of 1776, declaration of rights, § XII, AVALON PROJECT (Sept. 28, 1776), http://avalon.law.yale.edu/18th_century/pa08.asp ("That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained."); VT. CONST. of 1777, ch. 1, cl. 14, AVALON PROJECT (July 8, 1777), http://avalon.law.yale.edu/18th_century/vt01.asp (including the same recognition that "the people have a right to freedom of speech, and of writing, and publishing their sentiments"); *see also* DAVID L. HUDSON, THE FIRST AMENDMENT: FREEDOM OF SPEECH 4-5 (2012) (discussing provisions safeguarding free speech in the constitutions of Virginia, Pennsylvania, North Carolina, and Vermont from 1776-1777). And the Preamble to the Bill of Rights emphasized an intent to enshrine freedom of speech among the individual liberties to be protected from governmental "misconstruction or abuse," to instill "public confidence in the Government" and "best ensure the beneficent ends of its institution." U.S. CONST., amend. I-X pmbl.,

THE NAT'L ARCHIVES (1789), https://www.archives.gov/founding-docs/bill-of-rights-transcript#toc-the-preamble-to-the-bill-of-rights.

To fulfill the anti-tyranny purpose of the First Amendment, the Founders rejected the English common-law approach to speech, which demonstrated suspicion of disfavored ideas and a willingness to silence speech perceived as dangerous to society. As Blackstone explained, expression that had an "immoral or illegal tendency" was grounds for legal punishment. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *150-52 (1783). While such constraints on speech may have been compatible with Britain's parliamentary form of government, unchecked by popular will, they could not be reconciled with America's new democratic model, which derived its power from the people's sovereignty. America's departure from the parliamentary model therefore necessitated a rejection of English common-law constraints on speech, allowing speech to flourish, unrestrained, as a check on government power. *See* THE VIRGINIA REPORT, *supra*, at 220-21;[2] *see also* DAVID

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[2] Some Founding Fathers resisted this notion, including John Adams, who supported the now-infamous Alien and Sedition Acts of 1798 that punished speech critical of the government. *See Adams Passes First of Alien and Sedition Acts*, HISTORY.COM (Nov. 16, 2009), https://www.history.com/this-day-in-history/adams-passes-first-of-alien-and-sedition-acts; *An Act Respecting Alien Enemies*, THE AVALON PROJECT (July 6, 1798), http://avalon.law.yale.edu/18th_century/alien.asp. Even at that time, however, there was notable debate as to the Acts' constitutionality. *See Adams Passes First of Alien and Sedition Acts*, *supra* (noting "strong political opposition to these acts"); THE VIRGINIA REPORT,

M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS, 1870-1920 194 (1997). As James Madison, drawing on Radical Whig philosophy, stated: "If we advert to the nature of a Republican Government, we shall find that the censorial power is in the people over the government, and not in the government over the people." JAMES MADISON, JAMES MADISON'S "ADVICE TO MY COUNTRY" 95 (David B. Mattern ed., 1997). Therefore, the Framers concluded that governmental restrictions on speech, even disfavored speech, must be rejected.

Modern First Amendment jurisprudence reinforces the vital role of free speech as a bulwark against tyranny and as a core value to protect. This Court has repeatedly emphasized the importance of free speech to political freedom and representative government. *See, e.g., Janus*, 138 S. Ct. at 2464 (reaffirming that freedom of speech "is essential to our democratic form of government"). Freedom of speech is "essential to free government" because its abridgment would "impair[] those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

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supra, at 219 (stating that the Acts were "positively forbidden by one of the amendments to the Constitution"). And the Acts since have been repudiated and viewed as an aberration from America's core commitment to freedom of speech. *See, e.g., N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (recognizing that "the attack upon [the Sedition Act's] validity has carried the day in the court of history").

This Court has stated that speech on public issues "should be uninhibited, robust, and wide-open," even if it includes "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Sullivan*, 376 U.S. at 270. And, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). To the contrary, "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). Even speech that advocates violations of the law is protected if not directed at inciting imminent lawless action. *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969) (per curiam).

This protection of critical, disfavored, or even offensive speech extends also to speech that "interrupts" police officers in their duties. *See City of Houston v. Hill*, 482 U.S. 451, 455, 471-72 (1987). As this Court stated:

> [I]n the face of verbal challenges to police action, officers and municipalities must respond with restraint. We are mindful that the preservation of liberty depends in part upon the maintenance of social order. But the First Amendment recognizes, wisely we think, that a certain amount of expressive disorder

> not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.

Id. (citation omitted).

A probable-cause shield that makes it easier for police officers to arrest speakers in retaliation for speech that offends or upsets an officer would not only squash expressive disorder at the cost of individual freedom, but also silence debate on controversial issues of public concern. That approach would result in less protection for precisely the type of speech that needs protection most. Because "[f]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth," *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled in part by Brandenburg*, 395 U.S. at 449, the Court should not adopt a test that would insulate retaliatory motives from review, undermine the redressability of violations of First Amendment rights, and thereby chill speech vital to American democracy.

II. IMPORTING A PROBABLE-CAUSE TEST INTO THE RETALIATORY-ARREST CONTEXT IS UNJUSTIFIED AND UNNECESSARY TO WEED OUT INSUBSTANTIAL CLAIMS.

This Court need not create a new rubric for retaliatory-arrest claims because the burden-shifting framework articulated in *Mt. Healthy*, 429 U.S. at 287,

provides a suitable test for determining whether a plaintiff can recover for an action allegedly taken based on unconstitutional animus. This test has been applied successfully by this Court to a range of animus-infused constitutional claims and will work equally well in retaliatory-arrest cases. The unique characteristics that led this Court in *Hartman*, 547 U.S. at 259-65, to add a threshold, no-probable-cause element to retaliatory-prosecution claims are not present in the retaliatory-arrest context; and procedural rules, as well as the substantive defense of qualified immunity, already provide safeguards against officers' being burdened by insubstantial cases.

A. The Default *Mt. Healthy* Test Works Well When Applied To A Range Of Intent-Based Claims And Would Be Equally Effective For Analyzing Claims Alleging Retaliatory Arrests.

In *Mt. Healthy*, this Court considered how to evaluate whether an adverse governmental action was taken because of an individual's speech—in violation of the First Amendment—or occurred for independent, legitimate reasons. *See* 429 U.S. at 287. To prevail, an individual claiming unconstitutional retaliation must show that the exercise of a constitutionally protected right was a "substantial" or "motivating factor" for governmental action taken against the individual. *Id.* at 287. Once the individual has made such a showing,

the government will be held liable unless it shows "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct." *Id.*

This Court has applied *Mt. Healthy*'s burden-shifting test over a wide range of retaliation and other mixed-motive cases—from racial discrimination to various employment-related claims. *See Texas v. Lesage*, 528 U.S. 18, 20-21 (1999) (per curiam) (applying *Mt. Healthy* in a racial-discrimination case involving a university's admission decision); *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 677, 685 (1996) (applying *Mt. Healthy* to claims by at-will independent contractors alleging termination for exercising free-speech rights); *Hunter v. Underwood*, 471 U.S. 222, 232 (1985) (applying *Mt. Healthy* to a claim that Alabama law disenfranchising people convicted of crimes involving moral turpitude was enacted as a result of racial discrimination); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 870-72 & n.22 (1982) (plurality) (applying *Mt. Healthy* to a viewpoint-discrimination case involving a school board's decision to remove certain books from libraries); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-66, 270-71 & n.21 (1977) (applying *Mt. Healthy* reasoning in an equal-protection

case to determine that a rezoning denial was impermissibly motivated by a discriminatory purpose).[3]

A test that has successfully been used to assess government decisions regarding zoning, employment, and university admissions, among others, is a good place for this Court to start in determining the best test for allegedly retaliatory arrest decisions. The *Mt. Healthy* test acts to protect plaintiffs who have been acted against on the basis of unconstitutional animus, even when there could have been other bases for the governmental action at issue. *See, e.g.*, *Umbehr*, 518 U.S. at 674, 677; *Hunter*, 471 U.S. at 231-32. At the same time, it prevents the imposition of liability when governmental officials take actions they would have taken in any event, even if there was also animus present. *E.g.*, *Lesage*, 528 U.S. at 20-21 (holding that, under *Mt. Healthy*, a public university is not liable for racial animus in its admissions process if it would have made the same decision absent discrimination). This

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[3] The courts of appeals have also successfully used versions of *Mt. Healthy*'s but-for test to evaluate a wide range of claims alleging that a governmental actor had an impermissible motive for its action. *See, e.g.*, *Maben v. Thelen*, 887 F.3d 252, 267 (6th Cir. 2018) (prisoner's punishment allegedly resulting from his verbal complaint to a prison official); *McCue v. Bradstreet*, 807 F.3d 334, 338-39, 344-45 (1st Cir. 2015) (government commissioner's alleged use of regulations to retaliate based on a dairy farmer's speech in an earlier business dispute between the two); *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 817-18, 821, 823 (6th Cir. 2007) (police stop and search of a pro-life policy-and-advocacy group's "billboard trucks"); *Graham v. Henderson*, 89 F.3d 75, 79-81 (2d Cir. 1996) (prisoner's claims that prison officials discriminated against him based on race and speech).

structure, particularly when combined with the procedural and substantive protections already given to officers (as discussed in Part II.D, *infra*), strikes a balance between preserving the right to recover for unconstitutional retaliation and weeding out insubstantial cases that could unduly burden officers. *See Crawford-El v. Britton*, 523 U.S. 574, 591-92 (1998) (holding that balancing the interests of plaintiffs and defendants in retaliation cases does not necessitate altering the cause of action).

B. *Hartman*'s Retaliatory-Prosecution Rule Is Based On Unique Circumstances Not Present In Retaliatory-Arrest Cases.

This Court's addition of a new element and additional pleading requirement for retaliatory-prosecution claims should not be imported into the very different context of retaliatory-arrest claims. Reaffirming that a "standard case" for unconstitutional retaliation requires only a showing that retaliatory animus was a but-for cause of the challenged harm, this Court in *Hartman* determined that a plaintiff in a retaliatory-prosecution case, by contrast, must make a threshold showing of the absence of probable cause to support the crime charged. 547 U.S. at 265-66.

This Court identified three key characteristics of retaliatory-prosecution cases that justified this additional requirement: 1) the existence of probable

cause will always be a highly probative piece of evidence in evaluating why a prosecution occurred; 2) the causation analysis is uniquely complex because in most cases the individual alleged to harbor retaliatory animus is the same person who inflicts the challenged harm, whereas in retaliatory-prosecution cases the individual alleged to harbor the retaliatory animus (typically the arresting officer) is not the person who inflicts the challenged harm (by definition, the prosecutor); and 3) prosecutorial decisionmaking is afforded a strong presumption of regularity that the Court may not lightly discard. *Id.* at 261-63. None of those characteristics are present in the distinct context of retaliatory arrests.

The unusual causation analysis in retaliatory-prosecution cases underscores why the departure from *Mt. Healthy* in that context has no analog to warrant a similar departure in the very different context of retaliatory arrests. Because prosecutors enjoy absolute immunity, *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976), a plaintiff alleging retaliatory prosecution must look elsewhere for recovery, suing a different official for what this Court described as the "successful retaliatory inducement to prosecute." *Hartman*, 547 U.S. at 262. "Thus, the causal connection required here [in the retaliatory-prosecution context] is not merely the retaliatory animus of one person and that person's own injurious action, but between the retaliatory animus of one person and the action of another." *Id.* That is, a plaintiff "must show that the nonprosecuting

official acted in retaliation, and must also show that he induced the prosecutor to bring charges that would not have been initiated without his urging." *Id.*

Probable cause has a natural and inevitable role to play in that inducement analysis. When an officer arrests someone for a crime for which probable cause exists, the existence of probable cause reinforces the presumption of regularity that attaches to any prosecution that follows. By contrast, if a prosecutor brings charges despite the absence of probable cause, that scenario suggests that something irregular must have induced the prosecution. And that irregularity, in turn, opens the door to considering whether the officer's retaliatory animus motivated the prosecutorial harm. As such, want of probable cause "bridge[s] the gap between the nonprosecuting government agent's motive and the prosecutor's action, and [it] address[es] the presumption of prosecutorial regularity" otherwise afforded to a prosecutor's decisions. *Id.* at 263. Thus, in a retaliatory-prosecution claim, this Court did not view it as particularly burdensome—as a practical matter—to depart from *Mt. Healthy* and require a showing that probable cause is absent, because "[p]robable cause or its absence will be at least an evidentiary issue in practically all such cases" and "can be made mandatory with little or no added cost." *Id.* at 265-66.

By contrast, retaliatory-arrest cases do not involve circumstances that justify departing from the *Mt. Healthy* framework. First, the strong presumption of regularity accorded to prosecutorial decisions does not

apply to police making arrests. *Reichle v. Howards*, 566 U.S. 658, 669 (2012). Second, the causation that must be proved is straightforward: The governmental actor with the allegedly retaliatory animus is the same person who makes the challenged decision to arrest. Indeed, in *Hartman*, this Court expressly distinguished retaliatory-prosecution claims from "ordinary retaliation" claims where the individual harboring the retaliatory animus is also the individual taking the adverse action. 547 U.S. at 259. Retaliatory-arrest claims fit the "ordinary retaliation" model for which the *Mt. Healthy* test was designed, *see id.*, and should remain governed by that established framework.

Finally, the burden on a plaintiff of showing a lack of probable cause is less cabined and more onerous in retaliatory-arrest cases than in retaliatory-prosecution cases. In the context of a criminal prosecution, the government must have already committed to its theory of criminal liability and proffered evidence of probable cause in connection with the charging instrument. By contrast, a police officer need not commit to a theory of criminal liability to proceed with an arrest; indeed, the police may not come up with a theory of criminal liability—and therefore a theory of probable cause—until well after litigation of a retaliatory-arrest claim has already commenced. *See Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1950 (2018) (noting that the city first brought up the statute forming the basis of the city's theory of probable cause during the retaliatory-arrest litigation). To successfully plead that

there was no probable cause for arrest, the plaintiff in a retaliatory-arrest case would theoretically have to pore over every possible crime for which he could have been arrested, alleging the absence of probable cause for each of them. *See infra* Part III; *see also Devenpeck v. Alford*, 543 U.S. 146, 153, 155 (2004) (stating that arrests do not violate the Fourth Amendment when probable cause exists under the facts known to the officer, regardless of the crime ultimately charged or even contemplated at the time of arrest). This not only renders the existence of probable cause less probative, but also creates a significantly greater burden on the retaliatory-arrest plaintiff compared to the retaliatory-prosecution plaintiff who must establish lack of probable cause only for those crimes included in the charging instrument.

C. The Common Law Does Not Provide Guidance For The Elements Of A Retaliatory-Arrest Claim Or Support The Addition Of A No-Probable-Cause Requirement.

Although the common law is an appropriate starting point for "defining the contours and prerequisites of a § 1983 claim," common-law torts are informative only to the extent they are analogous to—and thus provide redress for—the deprivation of the constitutional right at issue. *See, e.g., Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017). No common-law tort addressed violations of freedom of speech through

retaliatory arrests; therefore, there is no appropriate common-law analog, and no viable common-law rationale, for departing from the traditional *Mt. Healthy* approach to animus-related § 1983 claims merely because an arrest is at issue.

As this Court noted in *Hartman*, "we certainly are ready to look at the elements of common-law torts when we think about elements of actions for constitutional violations, but the common law is best understood here more as a source of inspired examples than of prefabricated components of" constitutional claims. 547 U.S. at 258 (citation omitted). Lacking a common-law tort clearly analogous to a retaliatory prosecution in violate of the First Amendment, this Court did not look to the common law in *Hartman* when defining the elements of a retaliatory-prosecution claim. *See id.* at 258-59. Instead, in determining that a plaintiff should have to prove a lack of probable cause, the Court looked at the practical and legal realities of prosecution-based claims, not at prosecution-related, common-law torts. *See id.* at 259-65. And, as previously discussed, no comparable realities exist in the arrest context. *See* Part II.B.

Just as the common law contributed no guidance for defining the elements of a retaliatory-prosecution claim, so too is the common law uninformative when analyzing First Amendment rights in the arrest context. As even petitioners acknowledge, there was no common-law tort for retaliatory arrest in violation of freedom of speech at the time § 1983 was enacted.

Pet. Br. 43 (citing *Lozman*, 138 S. Ct. at 1957 (Thomas, J., dissenting)). The absence of such a tort is unsurprising given that the American law of freedom of speech was a conscious departure from that of the English common law, not a continuation of it. *See* Part I, *supra* (discussing America's rejection of Blackstone's conception of speech as potentially dangerous and worthy of punishment and America's adoption, instead, of a democratic model that values speech as a reflection of popular sovereignty). Moreover, First Amendment protection of speech had not even been incorporated as applicable to state governments when § 1983 was enacted in 1871. *See Gitlow v. New York*, 268 U.S. 652, 660 (1925) (stating, for the first time, that the First Amendment applies to the States).

None of the common-law torts invoked by petitioners—malicious arrest, malicious prosecution, and false imprisonment (Pet. Br. 43)—were designed to protect free-speech rights. Those torts are therefore neither analogous to nor sufficiently protective of speech rights to serve as models for retaliatory-arrest claims that invoke the First Amendment and are designed to protect speech. Section 1983 was not intended to be a static codification of common-law causes of action. *Rehberg v. Paulk*, 566 U.S. 356, 366 (2012). To the contrary, "[t]he purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action." *Carey v. Piphus*, 435 U.S. 247, 258 (1978).

As in *Hartman*, this Court should look to the practical and legal realities of the arrest context when analyzing retaliatory-arrest crimes. But whereas the practical and legal realities of prosecutions were deemed to warrant proof of a probable-cause element, *Hartman*, 547 U.S. at 259-65, the practical and legal realities of officers' authority to make arrests are very different, and importing *Hartman*'s probable-cause requirement into the arrest context would create unwarranted obstacles to protecting and vindicating First Amendment rights.

D. The Law Already Includes Ways To Screen Out Insubstantial Retaliatory-Arrest Claims Without Imposing Additional Elements.

Fear of unmeritorious, burdensome litigation does not warrant creating a new element for retaliatory-arrest claims that requires plaintiffs to prove the absence of probable cause for the arrest in question. To do so would transform *Hartman*'s prosecution-cabined exception to *Mt. Healthy* into the general rule for motive-based constitutional claims—an approach this Court has already rejected. *See Crawford-El*, 523 U.S. at 592, 594 (determining that the burden on governmental officials sued for motive-based, constitutional violations "does not justify a judicial revision of the law to bar claims that depend on proof of an official's motive" and to do so "would stray far from the traditional limits on judicial authority"). Indeed, when previously faced with a proposal like

petitioners' that would prevent courts from admitting evidence of subjective motive once a governmental defendant asserted an alternative, objective explanation, *id.* at 612 (Scalia, J., dissenting), this Court flatly refused, explaining that it would be "unprecedented" for the law "to immunize all officials whose conduct is 'objectively valid,' regardless of improper intent." *Id.* at 594.

The Court should be particularly wary of imposing an additional pleading and proof requirement that would impose "serious limitations upon 'the only realistic' remedy for the violation of [a] constitutional guarantee[]." *See id.* at 591. As discussed in Part III, *infra*, requiring a plaintiff alleging a retaliatory arrest to plead and prove the absence of probable cause—prior to permitting any consideration of the officer's alleged motive to retaliate for protected speech—would drastically limit the redressability of these types of First Amendment violations, given the vast array of commonplace offenses that could be used by an officer to justify a retaliatory arrest. And the addition of such an element is not necessary because existing substantive and procedural rules already weed out insubstantial claims.

Insubstantial retaliatory-arrest claims—despite their element of subjective motive—are still amenable to dismissal or summary disposition. *See id.* at 593. A retaliatory motive by itself is insufficient to establish a claim for retaliatory arrest; a plaintiff must also show causation. *Id.* So, to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a

plaintiff in a retaliatory-arrest case must allege sufficient facts to allow the court to draw the plausible inference that officers not only harbored animus toward the plaintiff because of the plaintiff's engagement in protected speech, but also that this animus was a substantial or motivating factor for the plaintiff's arrest. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."); *Mt. Healthy*, 429 U.S. at 287; *see also* FED. R. CIV. P. 12(b)(6). Merely alleging that the plaintiff engaged in protected speech and was arrested, without additional factual allegations to support causation, would fall short of showing that the plaintiff had a plausible claim for relief. *See Iqbal*, 556 U.S. at 678. Accordingly, insubstantial retaliatory-arrest claims will be susceptible to dismissal under Rule 12(b)(6), notwithstanding allegations that an officer harbored speech-related animus.

The but-for causation required to state a viable claim under the *Mt. Healthy* test also demonstrates why fears are unfounded that individuals engaging in criminal conduct will be able to shield themselves from arrest at the last minute by shouting some form of protected speech once arrest becomes imminent. *See, e.g.*, Brief for the District of Columbia, *et al.* as *Amici Curiae* Supporting Petitioner, *Nieves v. Bartlett* (No. 17-1174) 6-7 (noting that arrestees often criticize or insult police while being placed under arrest). If a

plaintiff alleges nothing more than engagement in protected speech while being arrested, that speech could not plausibly have motivated the arrest, which already was in motion when that plaintiff spoke.

Even if a complaint survives a Rule 12(b)(6) motion, there are a number of additional ways that insubstantial cases may be eliminated without the burden of a full trial. Officers still have the affirmative defense of qualified immunity in cases where the facts would not have led a reasonable officer to believe she was violating clearly established rights by making the arrest, *see Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982), and a denial of qualified immunity may be interlocutorily appealed when the ruling presents an issue of law. *See Behrens v. Pelletier*, 516 U.S. 299, 311 (1996). A court can also order the plaintiff to file a reply to the defendant's answer or grant a defendant's motion for a more definite statement prior to allowing discovery. *Crawford-El*, 523 U.S. at 598. In the event discovery does occur, district judges have broad discretion to limit the scope of discovery and dictate its course. *Id.* at 598-99. Furthermore, the defendant can prevail at summary judgment by showing that no genuine disputes of material fact would permit a juror to conclude that the arrest would not have occurred but for the plaintiff's protected speech. *Id.* at 593. When the subjective-motive element of a retaliatory-arrest claim is paired under the *Mt. Healthy* test with a but-for-causation requirement, there is no need to import an additional element requiring plaintiffs to prove absence of probable cause for the arrest to ensure that

insubstantial claims can be weeded out without subjecting officers to the burdens of trial. *See id.*

III. IMPORTING A PROBABLE-CAUSE REQUIREMENT WOULD PROVIDE OFFICERS WITH AN AUTOMATIC ESCAPE FROM TOO MANY RETALIATORY-ARREST SUITS, UNDERMINING THE CAPACITY OF § 1983 TO PROTECT FREE SPEECH.

Police officers enjoy tremendous discretion to arrest someone whenever there is probable cause to believe a crime has been committed. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). That rule applies even to misdemeanors—including those that carry only small fines as possible penalties. *See id.* (holding that arrest for a misdemeanor seatbelt offense punishable only by a fine was supported by probable cause and therefore did not violate the Fourth Amendment); *see also id.* at 366 (O'Connor, J., dissenting) (observing that the decision gives police officers "constitutional carte blanche to effect an arrest whenever there is probable cause to believe a fine-only misdemeanor has been committed"). Many Americans, though they may not know or intend it, break the law daily by committing crimes that go largely unrecognized, such as jaywalking, exceeding the speed limit, or failing to signal before making a turn. Even calling in sick to work could be a federal crime. *See*

Sorich v. United States, 555 U.S. 1204, 1205-06 (2009) (Scalia, J., dissenting from denial of certiorari) (noting that 18 U.S.C. § 1346 arguably criminalizes a salaried employee's phoning in sick to attend a ball game).

Although these types of crimes may not often result in an arrest, the fact remains that an officer possesses the authority to arrest someone whenever probable cause exists to believe that person committed *any* crime.[4] *See Atwater*, 532 U.S. at 354. That means that in almost any circumstance in which a person might publicly exercise First Amendment rights—and potentially experience retaliation for that speech in the form of an arrest—the arresting officer could likely identify some violation of law, however trivial, and claim probable cause existed to justify the arrest. And even if the arrest were motivated by the officer's animus toward the speaker and would not otherwise have occurred, the existence of probable cause would defeat the First Amendment claim outright under petitioners' proposed test. Indeed, that would be the result even if the speaker did not actually break any law, since under petitioners' rule the plaintiff would have to prove that there was not even *probable cause* to believe the infraction occurred. *See, e.g.*, Pet. Br. 16.

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[4] Arrests for misdemeanor crimes have become increasingly prevalent. *See* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1314-15 (2012) ("An estimated ten million misdemeanor cases are filed annually, flooding lower courts, jails, probation offices, and public defender offices.").

Suppose a person brings suit because she was arrested while handing out pamphlets on a public street and believes the arrest was made to retaliate against her in violation of her First Amendment rights. Before getting an opportunity to prove that her speech substantially motivated the officer's arrest, she might find herself having to prove, first, that the officer lacked probable cause to believe that she littered (*did a pamphlet accidentally slip out of her grasp?*)[5] or jaywalked (*did she see a break in traffic and dash across an empty intersection into a Starbucks?*).[6]

A speaker who is arrested while driving might have an even more difficult time showing that there was no probable cause for the arrest. Suppose a driver with a bullhorn mounted on his car is arrested while broadcasting speech; or maybe there is no bullhorn, but an arrest occurs when a bumper sticker offends the arresting officer. The driver might have to show that his actions gave the officer no reason to believe he was exceeding the posted speed limit,[7] was driving closer than reasonable to another car,[8] failed to come to a complete stop before proceeding through a flashing red

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[5] *E.g.*, ALA. CODE § 13A-7-29.

[6] *E.g.*, GA. CODE ANN. §§ 40-6-1, 40-6-92.

[7] *E.g.*, N.M. STAT. ANN. §§ 66-7-3, 66-7-301; TEX. TRANSP. CODE ANN. §§ 542.301, 543.001, 545.352.

[8] *E.g.*, VA. CODE ANN. §§ 46.2-816, 46.2-937.

signal,[9] failed to wear a safety belt,[10] or engaged in "careless driving."[11]

And some road-related crimes are so nebulous and subjective that it would be nearly impossible for a plaintiff to disprove the existence of probable cause. In Colorado, for example, it is a misdemeanor to drive "without due regard for the width, grade, curves, corners, traffic, and use of the streets and highways and all other attendant circumstances." COLO. REV. STAT. ANN. § 42-4-1402. It would not be difficult for an officer to mask a retaliatory motive by asserting probable cause to arrest the speaker for driving without due regard for the grade of the street. *See id.* Whereas the *Mt. Healthy* test would require the officer to show he would have made that same arrest regardless of the driver's speech, *see* 429 U.S. at 287, petitioners' probable-cause test would require dismissal of the claim without any consideration of the role speech played in the officer's decision.

Additional examples abound. A person exercising First Amendment rights at a rally who is then arrested while riding her bicycle home might have to plead that the officer lacked probable cause to believe she was not riding as far to the right of the roadway as

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[9] *E.g.*, S.D. CODIFIED LAWS § 32-38-7.

[10] *E.g.*, TEX. TRANSP. CODE ANN. § 545.413.

[11] *E.g.*, N.J. STAT. ANN. §§ 39:4-97, 39:4-104; N.M. STAT. ANN. § 66-8-114.

practicable,[12] rode more than two abreast,[13] or failed to give a hand signal continuously during the last 100 feet traveled before a turn or failed to continuously use a hand signal while stopped and waiting to turn.[14] Many of these rules—like their motor-vehicle equivalents, disorderly conduct, or even littering violations—give officers wide latitude to make subjective judgment calls when it comes to arrest. And that latitude, under petitioners' probable-cause proposal, would make it easy for an officer to defeat a retaliatory-arrest claim by articulating a belief that the rally speaker failed to continuously use a hand signal while stopped on her bike, waiting to turn. A § 1983 claim alleging an arrest made in retaliation for protected speech should not be dismissed based exclusively on the speaker's biking conduct without any consideration of the biker's speech.

To hold that an officer, even one patently acting on retaliatory animus, can escape liability merely by showing that he had probable cause to believe the plaintiff committed one of the crimes above, or one of the hundreds (if not thousands) of other potential misdemeanors, *see* Natapoff, *supra*, at 1314-15, would make it too easy for officers to escape liability for retaliatory arrests. Although this Court determined

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[12] *E.g.* GA. CODE ANN. §§ 40-6-1, 40-6-294(b); W. VA. CODE §§ 17C-11-1, 17C-11-5(a).

[13] *E.g.* GA. CODE ANN. §§ 40-6-1, 40-6-294(c); W. VA. CODE §§ 17C-11-1, 17C-11-5(c).

[14] *E.g.*, S.D. CODIFIED LAWS § 32-20B-6.

that adding a probable-cause element to retaliatory-*prosecution* claims would neither burden plaintiffs nor diminish § 1983's capacity to vindicate First Amendment rights, *see Hartman*, 547 U.S. at 265-66, the same cannot be said in the context of retaliatory arrests. To protect freedom of speech and ensure that speakers have a meaningful opportunity to seek redress for retaliatory arrests in violation of the First Amendment, this Court should reject petitioners' probable-cause proposal and continue to apply the tried-and-true *Mt. Healthy* framework that successfully balances the interests of speakers and governmental actors when animus-based claims arise in a wide variety of constitutional contexts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JOHN W. WHITEHEAD
DOUGLAS R. MCKUSICK
THE RUTHERFORD INSTITUTE
923 Gardens Blvd.
Charlottesville, VA 22901
(434) 978-3888

ERIN GLENN BUSBY
Counsel of Record
LISA R. ESKOW
727 East Dean Keeton St.
Austin, TX 78705
(713) 966-0409
ebusby@law.utexas.edu

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IN THE

Supreme Court of the United States

LUIS A. NIEVES AND BRYCE L. WEIGHT,

Petitioners,

v.

RUSSELL P. BARTLETT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THREE INDIVIDUAL ACTIVISTS *AS AMICI CURIAE* IN SUPPORT OF RESPONDENT

MICHELLE OTERO VALDÉS
Counsel of Record
MEGEN MADISON GOLD
CHALOS & CO, PC
2030 South Douglas Road
Suite 117
Coral Gables, FL 33134
(305) 377-3700
mov@chaloslaw.com
Counsel for Amici Curiae

October 9, 2018

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INTEREST OF THE *AMICI CURIAE*

The present *Amici Curiae*, Mary Eng, Nydia Tisdale, and Timothy "Chaz" Stevens (hereinafter, "*Amici*"),[1] constitute advocates championing the First Amendment right to free speech. As diverse members of the public amidst ever-increasing scrutiny of law enforcement officers, *Amici* have witnessed retaliatory arrests meant simply to suppress citizens' First Amendment freedom of speech.

Ms. Eng, a writer and "YouTube™-er," has dedicated her career to exposing police brutality of the mentally disabled in Portland, Oregon. Ms. Eng participated in the lawsuit of *U.S. v. City of Portland*, No. 3:12-CV-02265-SI (Dist. Or. Feb. 19, 2013), regarding patterns of abuse by law enforcement officers of mentally disabled persons, which resulted in a significant settlement with the City. As a result of her criticism of the police and city council, law enforcement officers retaliated against Ms. Eng. Ms. Eng was arrested for speaking out at a city council meeting, under the false probable cause pretext that she "brandished a corkscrew." Fortunately, video evidence proved the arrest to be purely a sham, exculpating Ms. Eng from all charges.

Ms. Tisdale, a citizen journalist, frequently attends and video records public local government events and meetings in Cumming, Georgia. Ms. Tisdale has been involved in multiple victorious lawsuits against the

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[1] No party or its counsel authored this brief in whole or in part. No party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. *See* S. Ct. R. 37.6. Blanket consents to submit *amicus curiae* briefs have been filed with the Court by Petitioners and Respondent. *See* S. Ct. R. 37.3(a).

City for violating the Georgia Open Meetings Act.[2] Ms. Tisdale has experienced first-hand attempts by law enforcement officers to suppress her rights. Ms. Tisdale was arrested for recording a public political rally in Dawson County, Georgia under the probable cause pretexts of "criminal trespass" and "obstructing an officer." Ms. Tisdale has sought recourse against the Dawson County law enforcement officers who arrested her, pursuant to a civil lawsuit for retaliatory arrest.[3]

Mr. Stevens, an outspoken critic and citizen investigator, actively participates in city commission meetings in Deerfield Beach, Florida. Mr. Stevens' investigations resulted in three city officials being removed from office for ethical violations and a former mayor's exposure of misconduct. As a result, the City subjected Mr. Stevens to retaliation through harassing investigations and blocking his email from its system, stifling Mr. Stevens' speech.

Amici understand that citizen participation in the various processes of federal, state and local government remains of the utmost importance in the preservation of a free nation by enabling crucial checks and balances. Arrests of citizens for their constitutional exercise of free speech unequivocally deters citizen participation in government. Consequently, citizens

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[2] *See Tisdale v. Gravitt*, 51 F. Supp. 3d 1378 (N.D. Ga. 2014); *see also* Samuel S. Olens, *Attorney General Sam Olens Prevails in Lawsuit Defending Open Government*, OFFICE OF ATT'Y GEN. CHRIS CARR (Aug. 26, 2014), https://law.georgia.gov/press-releases/2014-08-26/attorney-general-sam-olens-prevails-lawsuit-defending-open-government.

[3] *See Tisdale v. Wooten, et al.*, Case No. 2:16-CV-00092-WCO (N.D. Ga. May 9, 2016), stayed pending the outcome of the instant action.

should not feel fear of repercussions for exercising their constitutional rights and law enforcement officers should not be given free rein to arbitrarily arrest citizens for simply voicing their dissents.

Likewise, requiring proof of a lack of probable cause in a claim for retaliatory arrest not only unduly burdens plaintiffs, but has far-reaching consequences, severely hindering citizen participation in government and the growth of our nation, and acquiescing to retaliatory arrests without repercussion. Permitting immunized retaliatory arrests would transform our nation into that of a police state and wholly undermines the Constitution of the United States.

This brief will seek to illuminate the immense dangers of requiring an absence-of-probable-cause element in a First Amendment retaliatory arrest claim. *Amici* have a significant interest in protecting their own rights and those of their fellow citizens. *Amici* wish to supplement Respondent's Brief and lend support as to why this Court should affirm the Ninth Circuit Court of Appeals' decision, 712 Fed. Appx. 613 (9th Cir. 2017), and declare as entirely unworkable, the absence-of-probable-cause element in retaliatory arrest cases.

SUMMARY OF THE ARGUMENT

Public concern regarding police misconduct has grown exponentially in recent years, with police brutality cases becoming increasingly high-profile. A review of the United States Department of Justice (hereinafter "USDOJ") findings for various cities across the nation evidences patterns and practices of retaliatory arrests of citizens, causing extraordinarily chilling effects on First Amendment rights. In the instant case, *Amici* submit that this Court should

adopt the *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), framework and affirm the Ninth Circuit's decision for three main reasons:

I. The Ninth Circuit's rule has not triggered an increase in frivolous lawsuits against law enforcement officers. Petitioners and their *Amici Curiae* erroneously contend that not requiring a *prima facie* absence-of-probable-cause element for retaliatory arrest claims will open the floodgates to dubious and costly lawsuits against law enforcement officers and hinder the discharge of their duties. Pet. Br. 14, 19, 31, 36, 39; Br. for National Association of Counties, *et al.* as *Amici Curiae* 7, 11; Br. for District of Columbia, *et al.* as *Amici Curiae* 1-2, 6, 10, 13; Br. for United States as *Amicus Curiae* 8, 22, 25, 27. However, the Ninth Circuit has adopted the *Mt. Healthy*, 429 U.S. 274 (requiring plaintiffs to prove substantial motivation in ordinary retaliation claims) framework, rather than the *Hartman v. Moore*, 547 U.S. 250 (2006) (compelling plaintiffs to prove lack of probable cause to succeed in retaliatory prosecution claims) framework, and has not experienced a surge in unwarranted lawsuits against law enforcement officers. Thus, implementing the *Mt. Healthy* framework in retaliatory arrest cases will not deluge law enforcement officers with unmerited lawsuits.

II. Alternative avenues for plaintiffs arrested in retaliation to obtain recovery from law enforcement officers do not exist or are so insufficient that they essentially do not exist. Petitioners and their *Amici Curiae* mistakenly allege that other avenues than 42 U.S.C. § 1983

exist for plaintiffs to recover against law enforcement officers. Pet. Br. 16, 52-53; Br. for District of Columbia, *et al.* as *Amici Curiae* 4, 18-23; Br. for United States as *Amicus Curiae* 7. The USDOJ has determined complaint and review board procedures in numerous cities across the country to be wholly ineffective. Accordingly, enabling probable cause to defeat retaliatory arrest claims will eradicate plaintiffs' means of redress for violations of their constitutional rights.

III. The common law does not support an absence-of-probable-cause element in retaliatory arrest cases. Petitioners and their *Amici Curiae* misguidedly assert that the common law demands an absence-of-probable-cause element in retaliatory arrest claims, as opined by Justice Thomas in his dissent in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1957 (2018). Pet. Br. 13, 15, 16, 42-48; Br. for District of Colombia, *et al.* as *Amici Curiae* 1; Br. for United States as *Amicus Curiae* 6, 8-10, 13, 15. However, the common law does not endorse the imposition on plaintiffs the burden to prove lack of probable cause. In fact, the common law emphasizes malice and bad motive of law enforcement officers as an exception to requiring probable cause and places the burden on defendants to establish probable cause. Therefore, the common law does not necessitate an absence-of-probable-cause element in retaliatory arrest cases.

ARGUMENT

I. The Ninth Circuit's Rule Has Not Triggered An Increase In Frivolous Lawsuits Against Law Enforcement Officers.

The *Mt. Healthy*, 429 U.S. 274, framework should be adopted because the contrary assertions in Petitioners' Brief that substantial costs will be incurred and government officials will not be protected from disruption caused by unfounded claims are meritless. Pet. Br. 36, 39. Petitioners cite to only one case in the California Central District Court and three cases in the California Northern District Court during the period of 2013 to 2015.

In the California Northern District Court, 7,549 cases were filed in 2013; 7,239 cases were filed in 2014; and 6,884 cases were filed in 2015. *See Federal Court Management Statistics Judicial Caseload Profile* (hereinafter "*Fed. Stats.*"), U.S. COURTS (June 30, 2018), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2018.pdf. Based on a case search,[4] only five cases were related to retaliatory arrests.[5] Furthermore, 1,393 civil rights lawsuits were filed in the California Northern District Court in 2018. *Fed. Stats.*, *supra*. Based on a case search,[6]

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[4] LexisNexis® search of "retaliatory arrest" from January 1, 2013 to December 31, 2015 (N.D. Cal.).

[5] All figures represent approximations based exclusively on the figures provided by the United States Federal Court Management System and those cases published on LexisNexis® as of October 3, 2018. An analysis into cases not published on LexisNexis® was not undertaken.

[6] LexisNexis® search of "retaliatory arrest" from January 1, 2017 to December 31, 2018 (N.D. Cal.).

merely three cases involved retaliatory arrests. Likewise, in the California Central District Court, 17,464 cases were filed in 2013; 16,952 cases were filed in 2014; and 16,275 cases were filed in 2015. *Fed. Stats.*, *supra*. Based on a case search,[7] just one case related to retaliatory arrest. In 2018, 3,832 civil rights lawsuits were filed in the Central District Court of California. *Fed. Stats.*, *supra*. Based on a case search,[8] only five cases related to retaliatory arrests. Although Petitioners do not cite to any other district court cases in the Ninth Circuit, it is worth noting that:

- In the Alaska District Court, of the 515 cases filed in 2013; 518 cases filed in 2014; 510 cases filed in 2015; 653 cases filed in 2016; 585 cases filed 2017; and 676 cases filed in 2018, *Fed. Stats.*, *supra*; only 1 case—that at issue in the instant case—involved retaliatory arrest.[9] Furthermore, of the 62 civil rights lawsuits filed in 2018, *Fed. Stats.*, *supra*, none related to retaliatory arrests.[10]
- In the Arizona District Court, of the 10,417 cases filed in 2013; 13,745 cases filed in 2014; 9,458 cases filed in 2015; 11,213 cases filed in 2016; 11,718 cases filed in 2017; and 12,105 cases filed in 2018, *Fed. Stats.*, *supra*; merely 4 cases related to retaliatory arrests.[11] Additionally, of the 601 civil rights lawsuits

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[7] *Id.* from January 1, 2013 to December 31, 2015 (C.D. Cal.).

[8] *Id.* from January 1, 2017 to December 31, 2018 (C.D. Cal.).

[9] *Id.* from January 1, 2013 to December 31, 2018 (D. Alaska).

[10] *Id.* from January 1, 2017 to December 31, 2018 (D. Alaska).

[11] *Id.* from January 1, 2013 to December 31, 2018 (D. Ariz.).

filed in 2018, *Fed. Stats.*, *supra*, none involved retaliatory arrests.[12]

- In the California Eastern District Court, of the 6,096 cases filed in 2013; 6,024 cases filed in 2014; 5,772 cases filed in 2015; 5,477 cases filed in 2016; 5,457 cases filed in 2017; and 5,870 cases filed in 2018, *Fed. Stats.*, *supra*; only 4 cases involved retaliatory arrests.[13] Additionally, of the 897 civil rights cases filed in 2018, *Fed. Stats.*, *supra*, just 1 case involved retaliatory arrest.[14]
- In the California Southern District Court, of the 10,458 cases filed in 2013; 9,522 cases filed in 2014; 8,527 cases filed in 2015; 8,169 cases filed in 2016; 7,885 cases filed in 2017; and 10,436 cases filed in 2018, *Fed. Stats.*, *supra*; only 3 cases related to retaliatory arrests.[15] Further, of the 491 civil rights lawsuits filed in 2018, *Fed. Stats.*, *supra*, none involved retaliatory arrests.[16]
- In the Hawaii District Court, of the 1,137 cases filed in 2013; 1,197 cases filed in 2014; 997 cases filed in 2015; 1,051 cases filed in 2016; 1,090 cases filed in 2017; and 933 cases filed in 2018, *Fed. Stats.*, *supra*; just 2 involved retaliatory arrests.[17] Furthermore, of the 156 civil rights

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[12] *Id.* from January 1, 2017 to December 31, 2018 (D. Ariz.).

[13] *Id.* from January 1, 2013 to December 31, 2018 (E.D. Cal.).

[14] *Id.* from January 1, 2017 to December 31, 2018 (E.D. Cal.).

[15] *Id.* from January 1, 2013 to December 31, 2018 (S.D. Cal.).

[16] *Id.* from January 1, 2017 to December 31, 2018 (S.D. Cal.).

[17] *Id.* from January 1, 2013 to December 31, 2018 (D. Haw.).

lawsuits filed in 2018, *Fed. Stats.*, *supra*, merely 1 related to retaliatory arrest.[18]

- In the Nevada District Court, of the 3,802 cases filed in 2013; 3,707 cases filed in 2014; 3,742 cases filed in 2015; 4,258 cases filed in 2016; 4,822 cases filed in 2017; and 3,953 cases filed in 2018, *Fed. Stats.*, *supra*; only 2 related to retaliatory arrests.[19] Moreover, of the 480 civil rights lawsuits filed in 2018, *Fed. Stats.*, *supra*, none involved retaliatory arrests.[20]
- In the Oregon District Court, of the 3,364 cases filed in 2013; 3,342 cases filed in 2014; 3,183 cases filed in 2015; 3,577 cases filed in 2016; 3,068 cases filed in 2017; and 3,241 cases filed in 2018, *Fed. Stats.*, *supra*; merely 6 cases involved retaliatory arrests.[21] Additionally, of the 361 civil rights lawsuits filed in 2018, *Fed. Stats.*, *supra*, just 3 cases related to retaliatory arrests.[22]
- In the Washington Western District Court, of the 4,364 cases filed in 2013; 4,198 cases filed in 2014; 3,887 cases filed in 2015; 3,931 cases filed in 2016; 3,775 cases filed in 2017; and 3,934 cases filed in 2018, *Fed. Stats.*, *supra*; simply 8 cases related to retaliatory arrests.[23] Additionally, of the 393 civil rights lawsuits

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[18] *Id.* from January 1, 2017 to December 31, 2018 (D. Haw.).

[19] *Id.* from January 1, 2013 to December 31, 2018 (D. Nev.).

[20] *Id.* from January 1, 2017 to December 31, 2018 (D. Nev.).

[21] *Id.* from January 1, 2013 to December 31, 2018 (Dist. Or.).

[22] *Id.* from January 1, 2017 to December 31, 2018 (Dist. Or.).

[23] *Id.* from January 1, 2013 to December 31, 2018 (W.D. Wash.).

filed in 2018, *Fed. Stats.*, *supra*, merely 3 cases involved retaliatory arrests.[24]

In all of the district courts in the Ninth Circuit and the Ninth Circuit Court of Appeals,[25] fifty-seven cases involved retaliatory arrest in the period from January 1, 2013 to December 31, 2018.[26] Justice Kennedy, writing for the majority in *Lozman*, 138 S. Ct. at 1953 (citing Dept. of Justice-FBI, Uniform Crime Report, Crime in the United States, 2016 (Fall 2017)), stated that "[t]here are on average about 29,000 arrests per day in this country." Furthermore, there are approximately 765,000 law enforcement officers employed in the United States. *See* Brian A. Reeves, *Census of State and Local Law Enforcement Agencies, 2008*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (July 2011), https://www.bjs.gov/content/pub/pdf/csllea08.pdf.

Accordingly, of the 765,000 law enforcement officers employed; 10,585,000 arrests per year; and 48,008 civil cases—of which 8,666 involve civil rights—filed in 2018 in the district courts within the Ninth Circuit, *Fed. Stats.*, *supra*, only 16 cases involved retaliatory

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[24] *Id.* from January 1, 2017 to December 31, 2018 (W.D. Wash.).

[25] In the Ninth Circuit, the total "Other" appeals filed, not categorized as criminal, prisoner or administrative, are as follows: in 2013, 4,208 appeals; in 2014, 4,106 appeals; in 2015, 4,072 appeals; in 2016, 4,200 appeals; in 2017, 4,088 appeals; and in 2018, 3,894 appeals. *See U.S. Court of Appeals – Judicial Caseload Profile Ninth Circuit*, U.S. COURTS (June 30, 2018), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile0630.2018.pdf. Petitioners cite to merely three appellate cases in the Ninth Circuit to support their contentions.

[26] LexisNexis® search of "retaliatory arrest" from January 1, 2013 to December 31, 2018 in the Ninth Circuit Court of Appeals and district courts within the Ninth Circuit.

arrests.[27] The concerns for enabling groundless lawsuits against law enforcement officers and hindering law enforcement officers from performing their duties do not outweigh plaintiffs' entitlements to redress for violations of their First Amendment rights. The Ninth Circuit has implemented the *Mt. Healthy*, 429 U.S. 274, framework for retaliatory arrests since 2013 and before then, determined that probable cause did not defeat a claim for retaliatory arrest. *See Ford v. City of Yakima*, 706 F.3d 1188, 1194-95 (9th Cir. 2013); *Skoog v. Cnty. of Clackamas*, 469 F.3d 1221, 1232 (9th Cir. 2006). The statistics unquestionably prove that law enforcement officers in the Ninth Circuit have not been inundated with "a flood of suits," Br. for District of Columbia, *et al.* as *Amici Curiae* 13.

Justice Kennedy, writing for the majority in *Lozman*, 138 S. Ct. at 1953 (citing Brief for District of Columbia, *et al.* as *Amici Curiae* 5-11 (Jan. 29, 2018) (No.17-21)), stated, "the complexity of proving (or disproving) causation in these cases creates a risk that the courts will be flooded with dubious retaliatory arrest suits." Justice Kennedy recognized that "the causation problem in retaliatory arrest cases is not the same as the problem identified in *Hartman*" because the prosecutorial presumption of regularity does not apply in retaliatory arrest cases. *Id.* Thus, although without a threshold inquiry into probable cause there may theoretically be a risk of arrestees filing meritless retaliatory arrest lawsuits against law enforcement officers, said risk has not presented itself in the Ninth Circuit. The Tenth Circuit courts have likewise not experienced a rise in retaliatory arrest claims. Cases arising out of the Tenth Circuit illustrate the

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[27] *Id.* from January 1, 2017 to December 31, 2018 in the district courts within the Ninth Circuit.

procedural mechanisms by which frivolous retaliatory arrest claims may be filtered out prior to trial.[28] Greater risks exist of chilling a plaintiff's speech and eliminating a plaintiff's right to redress for his damages.

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[28] *See Lee v. Tucker*, No. 16-CV-01569-NYW, 2017 U.S. Dist. LEXIS 102662, at *20 (D. Colo. July 3, 2017), in which the District Court of Colorado found that probable cause did not defeat a retaliatory arrest claim but concluded that the plaintiff's claim failed on the merits because the plaintiff failed to create a genuine issue of material fact that his insults directed at the officer substantially motivated his arrest. *See also Titus v. Ahlm*, 297 Fed. Appx. 796, 801-02 (10th Cir. 2008), in which the Tenth Circuit held that even if the plaintiff need not plead the absence of probable cause, the plaintiff's claim nevertheless failed because he could not demonstrate that the officer's conduct was substantially motivated by his prior protected speech. According to *Fed. Stats.*, *supra*, and a LexisNexis® search of "retaliatory arrest" from January 1, 2017 to December 31, 2018, in the District Court of Colorado, 618 civil rights lawsuits were filed in 2018, with only 2 involving retaliatory arrests; in the District Court of New Mexico, 265 civil rights lawsuits were filed in 2018, with merely 1 relating to retaliatory arrest; in the District Court of Utah, 306 civil rights lawsuits were filed in 2018, with just 1 involving retaliatory arrest. In the Tenth Circuit, the total "Other" appeals filed, not categorized as criminal, prisoner or administrative, are as follows: in 2013, 962 appeals; in 2014, 853 appeals; in 2015, 864 appeals; in 2016, 1,272 appeals; in 2017, 896 appeals; and in 2018, 811 appeals. *See U.S. Court of Appeals – Judicial Caseload Profile Tenth Circuit*, U.S. COURTS (June 30, 2018), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile0630.2018.pdf. Based on a LexisNexis® search of "retaliatory arrest" from January 1, 2013 to December 31, 2018, in the Tenth Circuit, only 8 cases involved retaliatory arrests.

II. Alternative Avenues For Plaintiffs Arrested In Retaliation To Obtain Recovery From Law Enforcement Officers Do Not Exist Or Are So Insufficient That They Essentially Do Not Exist.

The *Mt. Healthy*, 429 U.S. 274, framework should be adopted in retaliatory arrest cases to allow plaintiffs an adequate remedy against law enforcement officers for First Amendment constitutional violations. Petitioners contend that retaliatory arrests may be remedied and deterred in other ways than 42 U.S.C. § 1983, such as through internal investigation and discipline. Pet. Br. 52-53. Likewise, the District of Columbia, *et al.* as *Amici Curiae* allege that state and local jurisdictions have developed "comprehensive procedures . . . to address police misconduct and control the power of arrest." Br. for District of Columbia, *et al.* as *Amici Curiae* 18. Although police departments publicly recognize the importance of responding to citizen complaints and holding law enforcement officers accountable, Pet. Br. 53; Br. for District of Columbia, *et al.* as *Amici Curiae* 19, in practice, citizens in various cities across the nation have significant difficulty filing complaints against law enforcement officers.

For example, an undercover television investigator attempted to obtain citizen complaint forms at thirty-eight police departments throughout South Florida and continuously experienced significant intimidation, harassment and verbal and physical threats as a result of the requests. Respectfully, the Court is urged to view the video documenting the investigator's report. *See* CBS4 News, *What Happens When You Try to File a Complaint Against a Police Officer*, YOUTUBE™ (Mar. 28, 2017), https://www.youtube.

com/watch?v=vnJ5f1JMKns&feature=youtu.be. The referenced composite video includes additional undercover investigations conducted at various police departments across the nation. Said investigations also reveal a consistent pattern and practice of police intimidation, harassment and verbal and physical threats, including arrest, merely resulting from an undercover investigator's request for a complaint form.

These investigations do not constitute isolated events. *See* Ryan J. Reilly, *Here's What Happens When You Complain to Cops About Cops*, HUFFINGTON POST (Oct. 9, 2015, 1:43 PM), https://www.huffingtonpost.com/entry/internal-affairs-police-misconduct_us_5613ea2fe4b022a4ce5f87ce (noting that St. Louis County Police reported receiving just a single formal complaint about officer behavior during the protests of August 2014, which was determined by the USDOJ as resulting from the difficulty or impossibility of lodging complaints); *Contacts Between Police and the Public, 2008*, OFFICE OF JUSTICE PROGRAMS BUREAU OF JUSTICE STATISTICS (Oct. 2011) 12, https://www.bjs.gov/content/pub/pdf/cpp08.pdf (estimating that 83.9 percent of individuals who experienced force or the threat of force felt that the police acted improperly and of those, only 13.7 percent filed complaints against the law enforcement officers).

Furthermore, the USDOJ has investigated numerous police departments across the country, finding substantial practices and patterns of ineffective complaint procedures and retaliation:

- In the USDOJ's Report on the Ferguson Police Department (hereinafter "FPD"), USDOJ Civil Rights Div., *Investigation of the Ferguson Police Department*, found at THE WASH. POST (Mar. 4, 2015),

http://apps.washingtonpost.com/g/documents/national/department-of-justice-report-on-the-ferguson-mo-police-department/1435/, the USDOJ found, *inter alia*, as follows:

- FPD's approach to enforcement results in violations of individuals' First Amendment rights. FPD arrests citizens for a variety of protected conduct, including talking back to officers, recording public police activities and lawfully protesting perceived injustices. *Id.* at 24. These "contempt of cop" cases are propelled by officers' beliefs that arrest is an appropriate response to disrespect and are generally charged as a failure to comply, disorderly conduct, interference with an officer or resisting arrest. *Id.* at 25.

- Furthermore, FPD lacks a meaningful system for holding officers accountable when they violate laws or policies and discourages individuals from making complaints. *Id.* at 82. "[I]t serves to contrast FPD's tolerance for officer misconduct against the Department's aggressive enforcement of even minor municipal infractions, lending credence to a sentiment . . . heard often from Ferguson residents: that a 'different set of rules' applies to Ferguson's police than to its African-American residents, and that making a complaint about officer misconduct is futile." *Id.*

- Moreover, even where FPD investigates a complaint, FPD consistently takes the word of officers over the word of complainants, even if the officer's version of events clearly contradicts the objective evidence. "On the

rare occasion that FPD does sustain an external complaint of officer misconduct, the discipline it imposes is generally too low to be an effective deterrent." *Id.* at 85.

- In the USDOJ's Report on the Chicago Police Department (hereinafter "CPD"), USDOJ Civil Rights Div., *Investigation of the Chicago Police Department*, U.S. DEP'T OF JUSTICE (Jan. 13, 2017), https://www.justice.gov/opa/file/925846/download, the USDOJ determined, *inter alia*, as follows:
  - CPD received over 30,000 complaints of police misconduct during the 5 years preceding the USDOJ's investigation, but fewer than 2 percent were sustained. *Id.* at 7.
  - Further, CPD fails to investigate the majority of cases. *Id.* at 8. The USDOJ's review of hundreds of investigative files revealed that the investigations by the Independent Police Review Authority and the Bureau of Internal Affairs, "with rare exception, suffer from entrenched investigative deficiencies and biased techniques." *Id.* at 56.
- In the USDOJ's Draft Report on the Milwaukee Police Department (hereinafter "MPD"), Collaborative Reform Team, *Collaborative Reform Initiative Milwaukee Police Department Assessment Report*, found at JOURNAL SENTINEL (Aug. 30, 2017), https://graphics.jsonline.com/jsi_news/documents/doj_draftmpdreport.pdf; *see also* Ashley Luthern and Mary Spicuzza, *Alderman Take Up Draft Department of Justice Report on Milwaukee Police Department*, JOURNAL SENTINEL (Sept. 14, 2017, 6:07 PM), https://www.jsonline.com/story/news/

crime/2017/09/14/aldermen-take-up-draft-department-justice-report-milwaukee-police-department/667448001/ (reporting that the Police Chief stated that the draft contained inaccuracies, but it raised valid concerns that needed to be addressed), the USDOJ found, *inter alia*, as follows:

- MPD policy does not provide for appropriate oversight. Draft Report, *supra* at 123. MPD's policy regarding complaints from community members allows a supervisor to determine whether a complaint form shall be completed, allowing too much discretion and creating conflicts of interest. *Id.*

- Additionally, MPD's complaint investigation files are poorly organized, lack consistency and are often incomplete. *Id.* at 125. "Many community members expressed frustration and distrust in the citizen complaint process and oversight of MPD." *Id.*

- In the USDOJ's Report on the San Francisco Police Department (hereinafter "SFPD"), *Collaborative Reform Initiative An Assessment of the San Francisco Police Department*, CMTY. ORIENTED POLICING SERVS. U.S. DEP'T OF JUSTICE (Oct. 2016), https://ric-zai-inc.com/Publications/cops-w0817-pub.pdf, the USDOJ determined, *inter alia*, as follows:

  - "At present, the culture of SFPD is not directed toward building an environment of accountability. Policies are disregarded and investigations are not robust. The lack of coordination between institutional partners for investigations is a real challenge to

building trust within the community." *Id.* at 157.

- In the USDOJ's Report on the Baltimore City Police Department (hereinafter "BPD"), USDOJ Civil Rights Div., *Investigation of the Baltimore City Police Department*, U.S. DEP'T OF JUSTICE (Aug. 10, 2016), https://www.justice.gov/crt/file/883296/download, the USDOJ found, *inter alia*, as follows:
  - BPD violates the First Amendment by retaliating against individuals engaged in constitutionally protected activities. *Id.* at 9.
  - Furthermore, "a cultural resistance to accountability has developed and been reinforced within the Department." *Id.* at 139. BPD lacks adequate systems to investigate complaints and impose discipline. *Id.* Furthermore, BPD discourages members of the public from filing complaints against officers and BPD officers . . . actively discourage citizens from filing complaints . . . ." *Id.* at 140.
  - Moreover, BPD officers expressly discourage citizens from filing complaints, "sometimes mocking or humiliating them in the process. Some civilians wishing to alert BPD to officer misconduct had to endure verbal abuse and contact BPD multiple times before investigators would move forward with any investigation." *Id.* at 140-141. "BPD's internal culture is resistant to effective discipline" and "BPD has allowed violations of policy to go unaddressed even when they are widespread or involve serious misconduct." *Id.* at 149.

- In the USDOJ's Report on the Calexico Police Department (hereinafter "CaPD"), *Collaborative Reform* Initiative *An Assessment of the Calexico Police Department*, CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE (2016), https://ric-zai-inc.com/Publications/cops-w0804-pub.pdf, the USDOJ determined, *inter alia*, as follows:
  - CaPD's policy language as to complaints "suggests that the complainant must furnish proof that the alleged misbehavior was indeed misconduct before a complaint may even be filed." *Id.* at 38-39.
  - Further, CaPD does not sufficiently make complaint forms accessible to the public. *Id.* at 44.
- In the USDOJ's Report on the Philadelphia Police Department (hereinafter "PPD"), *Collaborative Reform* Initiative *An Assessment of Deadly Force in the Philadelphia Police Department*, CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE (2015), https://ric-zai-inc.com/Publications/cops-w0753-pub.pdf, the USDOJ found, *inter alia*, as follows:
  - "Distrust in the ability of PPD to investigate itself pervades segments of the community," primarily due to past and present scandals, high-profile officer-involved shootings and a lack of transparency in investigative outcomes. *Id.* at 122.
- In the USDOJ's Report on the Cleveland Division of Police (hereinafter "CDP"), USDOJ Civil Rights Div., U.S. Atty's Office N. Dist. of Ohio, *Investigation of the Cleveland Division of Police*, U.S. DEP'T OF JUSTICE (Dec. 4, 2014),

https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf, the USDOJ determined, *inter alia*, as follows:

- CDP has a pattern and practice of unreasonable force that is "significantly out of proportion to the resistance encountered and officers too often escalate incidents with citizens instead of using effective and accepted tactics to de-escalate tension." *Id.* at 4. The force is applied "as punishment for the person's earlier verbal or physical resistance to an officer's command, and is not based on a current threat posed by the person, which is not legally justified." Id.
- Additionally, the Charter of the City of Cleveland requires the Office of Professional Standards to conduct "a full and complete investigation" of each police misconduct complaint filed by a citizen. *Id.* at 38. CDP's policies recognize that there should be a readily accessible procedure to submit complaints of misconduct to ensure that officers serve in an accountable manner. *Id.* at 38. However, CDP fails to adequately investigate civilian complaints and CDP does not implement appropriate corrective measures. *Id.* at 37. It "is apparent that the reality falls far short of the written policies on these matters." Moreover, CDP's complaint investigations "are neither timely nor thorough, . . . civilians face a variety of barriers to completing the complaint process, and . . . the system as a whole lacks transparency. As a result, CDP falls woefully

short of meeting its obligation to ensure officer accountability and promote community trust." *Id.*

- In the USDOJ's Report on the Albuquerque Police Department (hereinafter "AlPD"), USDOJ Civil Rights Div., Findings Letter *Re: Albuquerque Police Department*, U.S. DEP'T OF JUSTICE (Apr. 10, 2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/04/10/apd_findings_4-10-14.pdf, the USDOJ found, *inter alia*, as follows:
  - AlPD's "independent oversight structure could . . . do far more to involve the community . . . ." *Id.* at 38. Citizen complaints are subject to strict limitations that keep the Police Oversight Commission from being able to address potentially serious allegations of misconduct. *Id.*
  - Furthermore, "the Review Officer is more closely aligned with the department than with the community that the Review Officer serves" as evidenced by a failure "to find violations of department policy in cases where it is more likely than not that violations clearly occurred and . . . interpreted the department's policies in ways that are contrary to the policies themselves but favorable to officers." *Id.* at 39.
- In the USDOJ's Report on the Newark Police Department (hereinafter "NPD"), USDOJ Civil Rights Div., U.S. Atty's Office Dist. of N.J., *Investigation of the Newark Police Department*, U.S. DEP'T OF JUSTICE (July 22, 2014), https://www.justice.gov/sites/default/files/crt/lega

cy/2014/07/22/newark_findings_7-22-14.pdf, the USDOJ determined, *inter alia*, as follows:

- "[T]here is reasonable cause to believe that the NPD has engaged in a pattern or practice of unconstitutional arrests for behavior perceived as insubordinate or disrespectful to officers—often charged as obstruction of justice, resisting arrest, or disorderly conduct." *Id.* at 11-12. In its Report, the USDOJ illustrates one such response, eerily similar to the instant case: an individual was arrested after he questioned the officers' decision to arrest his neighbor. *Id.* The individual alleged that the officers immediately proceeded to use force against him. *Id.* at 13. The officers' own version of events, reporting that the individual told them loudly and "in a belligerent manner" that they could not arrest his neighbor, did not establish probable cause for the officers' decision to arrest the man for obstructing the administration of law. *Id.*

- Moreover, NPD's system for investigating complaints is "structured to curtail disciplinary action and stifle investigations into the credibility of the City's police officers." *Id.* at 35. NPD has "serious deficiencies" in its handling of complaints "that translate to a lack of accountability for serious misconduct." *Id.* For instance, NPD has intimidated and discouraged victims' and witnesses' participation in the complaint process. *Id.* at 41.

- In the USDOJ's Report on the Seattle Police Department (hereinafter "SPD"), USDOJ Civil Rights Div., U.S. Atty's Office W. Dist. of Wash.,

Investigation of the Seattle Police Department, U.S. DEP'T OF JUSTICE (Dec. 16, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findletter_12-16-11.pdf, the USDOJ found, *inter alia*, as follows:

- "SPD engages in a pattern or practice of using excessive force against individuals who express discontent with, or 'talk back to,' police officers." *Id.* at 14.
- Additionally, SPD's Early Intervention System and internal affairs departments "do not provide the intended backstop for the failures of the direct supervisory review process" because the Office of Professional Accountability (hereinafter "OPA") disposes of two-thirds of citizens' complaints by sending them to SPD's precincts, where the quality of investigations is "appalling" and OPA overuses and improperly uses the finding of "Supervisory Intervention," resulting in the disposal of serious allegations "simply to avoid the 'stigma' of a formal finding." *Id.* at 5.

- In the USDOJ's Report on the Maricopa County Sheriff's Office (hereinafter "MCSO"), USDOJ Civil Rights Div., Findings Letter *Re: United States' Investigation of the Maricopa County Sheriff's Office*, U.S. DEP'T OF JUSTICE (Dec. 15, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf, the USDOJ determined, *inter alia*, as follows:
  - MCSO's law enforcement officers and staff unlawfully retaliate against citizens who complain about or criticize MCSO. *Id.* at 2,

4-5. "MCSO deputies have sought to silence individuals who have publicly spoken out and participated in protected demonstrations against the policies and practices of MCSO." *Id.* at 13.

- Furthermore, MCSO has failed to put in place meaningful oversight and accountability structures, including a system for handling complaints. *Id.* at 12. "Further, because deputy misconduct often reflects poorly on the actions or inactions of the first-line supervisor, MCSO's reliance on first-line supervisors places the critical determination of whether to go forward with an investigation in the hands of someone who has an inherent conflict of interest in having a matter thoroughly investigated." *Id.*

- In the USDOJ's Report on the Puerto Rico Police Department (hereinafter "PRPD"), USDOJ Civil Rights Div., *Investigation of the Puerto Rico Police Department*, U.S. DEP'T OF JUSTICE (Sept. 5, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/09/08/prpd_letter.pdf, the USDOJ found, *inter alia*, as follows:

  - There are pervasive and longstanding deficiencies in PRPD's civilian complaint process, particularly, the intake procedure discourages civilians from filing complaints; the protocols are insufficient to ensure complete and timely investigations; and investigators lack training and resources to complete adequate investigations. *Id.* at 68.

  - Moreover, the average length of an investigation is nearly four years, with some

investigations taking up to ten years or more to complete. *Id.* at 70.

- In the USDOJ's Report on the New Orleans Police Department (hereinafter "NOPD"), USDOJ Civil Rights Div., *Investigation of the New Orleans Police Department*, U.S. DEP'T OF JUSTICE (Mar. 16, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf, the USDOJ determined, *inter alia*, as follows:
  - NOPD's system for receiving, investigating, and resolving misconduct complaints does not effectively hold law enforcement officers accountable. *Id.* at xvii-xviii. "Discipline and corrective action are meted out inconsistently and, too often, without sufficient consideration of the seriousness of the offense and its impact on the police-community relationship." *Id.* at xviii.
  - Additionally, the use of retaliatory force is widely accepted within NOPD. *Id.* at 5. "[T]he perceived lack of integrity and effectiveness of the misconduct complaint process was a theme that we heard from many community members, who frequently expressed reluctance to make complaints against specific officers out of fear of retaliation and reprisal." *Id.* at 38.

Furthermore, the American Civil Liberties Union (hereinafter "ACLU") has found:

- With respect to Connecticut police agencies, "many . . . in the state fail to clearly post their complaint policies and forms online, refuse to accept anonymous complaints, and include threats of prosecution in their complaint intake

protocols." *Earning Trust: Addressing Police Misconduct Complaints in Connecticut*, ACLU OF CONN. (Jan. 26, 2017), https://www.acluct.org/en/news/earning-trust-addressing-police-misconduct-complaints-connecticut.

- In Rhode Island, police agencies have made it more difficult for complainants to locate complaint procedures, "and to have the kind of trust in the internal affairs process that is critical to facilitate feedback about police conduct." *Public Access to Police Complaint Forms and Procedures An Update*, ACLU OF R.I. (Sept. 2014) 3, http://riaclu.org/images/uploads/Police_Complaint_Procedures_2014_Update_Report_final1.pdf. For instance, five police departments have no complaint forms or procedures posted online, *id.* at 2; nineteen of the departments that follow procedures in accordance with the law fail to accept complaints in the legally required manner, *id.* at 3; at least two departments require a complainant's social security number, and at least one requires the complaint to be notarized, *id.*; at least eleven departments make "selective cautionary statements" or require complainants to sign disclaimers, suggesting the complainants will be under investigation, *id.*; and "[s]everal departments give only a perfunctory explanation of their complaint process, barely adhering to the law and providing virtually no guidance to complainants." *Id.*

The Office of the City Auditor's Report on the Austin Police Department (hereinafter "APD"), Office of the City Auditor, *Audit of the Austin Police Department's Handling of Complaints*, ASS'N OF LOCAL GOV'T AUDITORS (Sept. 2016), https://algaonline.org/Docu

mentCenter/View/5394, determined, *inter alia*, as follows:

- "[T]here are barriers to filing complaints and APD's policies and practices make it difficult to ensure that complaints are handled consistently." *Id.*
- Furthermore, the complaint process is not accessible and issues exist with how the APD handles complaints. *Id.* at 3. A 2007 U.S. Department of Justice memorandum to APD identified many of the same issues along with several recommendations to resolve them but the issues have yet to be addressed. *Id.*

Based on the foregoing reports, it is clear that citizens retaliated against by law enforcement officers have no remedy in the complaint procedures of police departments throughout the nation. If this Court adopts the *Hartman*, 547 U.S. 250, framework and determines that probable cause defeats a 42 U.S.C. § 1983 retaliatory arrest claim, any remedy for citizens arrested in retaliation for their exercise of free speech will be extinguished. Such a rule immunizes law enforcement officers for chilling citizens' freedoms of speech, enables selective enforcement and provides no accountability for law enforcement actions. Accordingly, the *Mt. Healthy*, 429 U.S. 274, framework should be adopted in retaliatory arrest cases to allow plaintiffs a fighting chance at recovering against law enforcement officers for constitutional violations.

III. The Common Law Does Not Support An Absence-Of-Probable-Cause Element In Retaliatory Arrest Claims.

The common law bolsters the adoption of the *Mt. Healthy*, 429 U.S. 274, framework rather than an

absence-of-probable-cause element, contrary to the arguments advanced by Petitioners and their *Amici Curiae*. Pet. Br. 16, 52-53; Br. for District of Columbia, *et al.*, as *Amici Curiae* 4, 18-23; Br. for United States as *Amicus Curiae* 7. Justice Thomas' dissent in *Lozman*, 138 S. Ct. at 1957, noted that probable cause defeated the common law torts most analogous to a First Amendment retaliatory arrest claim, consisting of malicious prosecution, malicious arrest and false imprisonment. Pet. Br. 42-44.

In support of their contention that most courts at common law held that probable cause defeated false imprisonment claims, Petitioners cite to *Dir. Gen. of R.R.s v. Kastenbaum*, 263 U.S. 25 (1923) and *Fagan v. Pittsburgh Terminal Coal Corp.*, 149 A. 159 (Pa. 1930). Pet. Br. 45. However, the Court in *Kastenbaum* held that the *defendant* had the burden to establish probable cause for the arrest and that probable cause constituted a mixed question of law and fact to be submitted to the jury. *Kastenbaum*, 263 U.S. at 27-28. Furthermore, *Fagan* involved a complaint against a railroad company alleging that the company directed the officers as its agents to arrest the plaintiff. *Fagan*, 149 A. at 162. The Court found that the plaintiff produced no such evidence and the officers acted as public officials with probable cause. *Id.* at 163. *Fagan* involved a complex chain of causation, with the plaintiff instigating a lawsuit against the railroad company rather than the law enforcement officers. Thus, *Fagan* does not lend support to ordinary retaliatory arrest cases.

Petitioners similarly cite to *Hawley v. Butler & Marcellus*, 54 Barb. 490 (N.Y. 1868). Pet. Br. 45. However, the Court made clear in *Hawley* that "where there is probable cause, whether it appear from

extrinsic circumstances, or from the conduct, falsehoods or contradictions of the party arrested, the officer, acting *without malice or bad motive*, will be protected, if acting in the line of his duty . . . ." *Hawley*, 54 Barb. at 504 (emphasis added). The Court further stated, "it sometimes happens that the same act, done by the same person, proceeding from an evil or bad motive, is actionable, which would not be so actionable, if proceeding from the honest intent to discharge a public duty." *Id.* at 492. Based on the Court's analysis, an officer acting with malice or bad motive will clearly not be protected by probable cause against a lawsuit. This reasoning is consistent with the evaluation by Justice Kennedy, writing for the majority, in *Lozman*, 138 S. Ct. at 1954, that the petitioner would not have succeeded because the officer appeared to have acted in good faith with no knowledge of the petitioner's constitutionally protected activities.

Furthermore, Petitioners opine that in thirty-eight states and the District of Columbia, probable cause is a bar or an affirmative defense to false imprisonment cases. Pet. Br. 45. However, only four of the cases cited occurred within a fifty-year period of the enactment of 42 U.S.C. § 1983 in 1871, and many occurred within the past thirty years. Accordingly, the other thirty-five cited cases are wholly irrelevant to the common law analysis, as the common law analysis centers around "the state of the common law at the time § 1983 was enacted." *Lozman*, 138 S. Ct. at 1957 (Thomas, J. dissenting) (citing *Heck v. Humphrey*, 512 U.S. 477, 491 (1994) (Thomas, J. concurring)). In his dissent in *Lozman*, 138 S. Ct. at 1957, Justice Thomas focused his examination on nineteenth century court decisions. Subsequent to the nineteenth century, court decisions involving false imprisonment claims have no

weight of authority as the state of the common law at the time 42 U.S.C. § 1983 was enacted.

The four nineteenth century common law cases cited by Petitioners do not form the basis for establishing an absence-of-probable-cause element in retaliatory arrest claims. Pet. Br. 45. Petitioners cite to *Beebe v. De Baun*, 8 Ark. 510 (1848). *Beebe* involved a writ of replevin with a capias clause that was issued against the plaintiff, commanding the sheriff to seize the plaintiff's slaves and if the slaves could not be found, then to arrest the plaintiff. *Beebe*, 8 Ark. 510. *Beebe* can be better analogized to an officer obtaining a warrant from a magistrate to arrest a particular person. In said situation, an additional complication is present, creating a complex chain of causation not found in ordinary retaliatory arrest claims.

Petitioners further cite to *McCaffrey v. Thomas*, 56 A. 382 (Del. Super. Ct. 1903), *Jackson v. Knowlton*, 173 Mass. 94 (1899), and *Mikelberg v. Phila. Rapid Transit Co.*, 16 Pa. D. 906 (Pa. Com. Pl. 1907). The Court in *McCaffrey*, 56 A. at 383, explained that "where an arrest is made by an officer without warrant the burden is upon the officer, in a case like this, to show reasonable cause or grounds for the arrest." The Court left the decision as to probable cause to the jury. *Id.* at 383-84. Similarly, the Court in *Jackson* held that the jury instruction placing the burden on the plaintiff to show lack of probable cause was erroneous and that the burden instead rested with the defendant to establish probable cause. *Jackson*, 173 Mass. at 95, 96-97 (quoting *Bassett v. Porter*, 64 Mass. 418, 420 (1852)) ("Every imprisonment of a man is *prima facie* a trespass; and in an action to recover damages therefor, if the imprisonment is proved or admitted, the burden of justifying it is on the defendant."). The Court quoted

Badkin v. Powell, 2 Cowp. 476, 478 (1776): "[a] gaoler if he has a prisoner in custody is *prima facie* guilty of imprisonment; and therefore must justify." *Jackson*, 173 Mass. at 94-95. The Court likewise quoted *Holroyd v. Doncaster*, 11 Moore 440, 3 Bing. 492 (1826), "[w]here a man deprives another of his liberty, the injured party is entitled to maintain an action for false imprisonment, and it is for the defendant to justify his proceeding by showing that he had legal authority for doing that which he had done." *Jackson*, 173 Mass. at 95.

Equally, the Court in *Mikelberg*, 16 Pa. D. 906, held that in an action for false arrest, the burden rests with the defendant to prove that the arrest arose from probable cause. Therefore, as acknowledged by Petitioners, Pet. Br. 45, *McCaffrey*, *Jackson* and *Mikelberg* place the burden of proving probable cause on the defendant, rather than as an element of the plaintiff's *prima facie* case. *McCaffrey*, *Jackson* and *Mikelberg* support the adoption of the *Mt. Healthy*, 429 U.S. 274, framework in retaliatory arrest cases, allowing a defendant to utilize probable cause as evidence of a defendant's lack of retaliatory animus. *See Ford*, 706 F.3 at 1194, n.2 (citing *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 901 (9th Cir. 2008)); Br. for Pet. at 15-16, 39, *Lozman*, 138 S. Ct. 1945 (Dec. 22, 2017) (No. 17-21).

Additionally, the Court in *Dinsman v. Wilkes*, 53 U.S. 390, 402 (1852), in an action by a marine against his commanding officer for false imprisonment, explained that,

> [W]hether the acts charged were done or not, and what motives actuated the defendant, are questions of fact exclusively for the jury; and probable cause or not is of no further

> importance than as evidence to be weighed by them in connection with all the other evidence in the case, in determining whether the defendant acted from a sense of duty or from ill-will to the plaintiff.

The Court further determined that if the jury believed,

> [T]hat the defendant, in all the acts complained of, was actuated alone by an upright intention to maintain the discipline of his command and the interest of the service in which he was engaged, then the plaintiff is not entitled to recover. But, if they find that the punishment of the plaintiff was in any manner or in any degree increased or aggravated by malice or a vindictive feeling towards him on the part of [the commanding officer], or by a disposition to oppress him, then the plaintiff is entitled to recover.

Id. at 404-05.

The Court has recognized *Dinsman* as standing for the proposition that where a party procured the arrest of an individual maliciously and without probable cause, that party could be held liable. *See Rehberg v. Paulk*, 566 U.S. 356, 365 (2012) (citing *Dinsman* as finding no immunity "where a party had maliciously, and without probable cause, procured the plaintiff to be indicted or arrested for an offense of which he was not guilty"); *U.S. v. Stanley*, 483 U.S. 669, 699 (1987) (quoting *Wilkes v. Dinsman*, 48 U.S. 89, 123 (1849), after remand, *Dinsman v. Wilkes*, 53 U.S. 390 (1852)) ("It must not be lost sight of . . . that, while the chief agent of the government, in so important a trust, when conducting with skill, fidelity, and energy, is to be

protected under mere errors of judgment in the discharge of his duties, yet he is not to be shielded from responsibility if he acts out of his authority or jurisdiction, or inflicts private injury either from malice, cruelty, or any species of oppression, founded on considerations independent of public ends."); *Malley v. Briggs*, 475 U.S. 335, 340-41, n.3 (1986) (explaining that in 1871, "the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause").

Accordingly, *Dinsman* represents the state of the common law at the time 42 U.S.C. § 1983 was enacted and further supports the *Mt. Healthy* framework that probable cause may be established by defendants as evidence of a lack of retaliatory animus. *See Ford*, 706 F.3d at 1194, n.2; Br. for Pet. at 15-16, 39, *Lozman*, 138 S. Ct. 1945 (2017) (No. 17-21).

Furthermore, Petitioners and their *Amici Curiae* cite to the Restatement (First) of Torts § 127 (Am. Law. Inst. 1934), particularly an illustration in Restatement § 127, for the proposition that if the arrest was for the proper purpose of bringing the arrestee before the courts and securing the administration of justice, the arrest was privileged regardless of whether the officer had an ulterior motive in making the arrest. Pet. Br. 45-47; Br. for United States as *Amicus Curiae* 12-14; RESTATEMENT § 127 cmt. a., illus. 1. The next illustration in Restatement § 127 limits the scope of an officer's privilege, such that if the officer's purpose is not to bring the arrestee before a court, then the arrest is not privileged. RESTATEMENT § 127 cmt. a., illus. 2. Accordingly, Restatement § 127 does not provide a

privilege to officers who detain arrestees for purposes of harassment or deterrence for their protected speech, rather than for the administration of the law.

Restatement § 127 does not mention "probable cause" or "reasonable belief" or any other similar language. Rather, Restatement § 127 states that if a law enforcement officer makes an arrest for the purpose of bringing a citizen before a court, the fact that he has an ulterior motive in arresting the citizen does not render the arrest unprivileged. RESTATEMENT § 127 cmt. a. Additionally, Restatement § 127 cmt. a. provides, "where upon the evidence the actor's purpose is doubtful, the other must establish the existence of an improper purpose. If the actor has followed up the arrest by taking the proper steps to bring the person arrested before the proper tribunal, the burden is upon the other to show that such conduct was an afterthought." *Id.* Restatement § 127 comports with the *Mt. Healthy*, 429 U.S. 274, framework because *Mt. Healthy*, 429 U.S. 274, does not propose that if a law enforcement officer arrests a citizen ostensibly in retaliation, he is automatically stripped of his qualified immunity. Instead, the plaintiff must establish his constitutional right and prove that his arrest was substantially motivated by his exercise of that right. Said standard contemplates that the proper purpose of preventing crime may have constituted the arresting officer's afterthought, especially evident in situations where the officer, subsequent to the arrest, scours the statutes for applicable crimes to justify the arrest. *See* Br. for Pet. at 47-48, *Lozman*, 138 S. Ct. 1945 (2017) (No. 17-21).

Continuing with the Restatement (First) of Torts, one could analogize First Amendment retaliatory

arrest claims with Restatement § 865, Interference with a Right to Vote or Hold Office,[29] providing,

> A person who by a consciously wrongful act intentionally deprives another of a right to vote in a public election . . . is liable to the other in an action of tort.

This section applies "where a person with knowledge that another has a right to vote in a public election . . . does an act either for the purpose of preventing the other from exercising the right or with knowledge that his act will result in the failure of the other to exercise the right." RESTATEMENT § 865 cmt. a. (Am. Law Inst. 1939). Such wrongful conduct may include "the use of tortious force, fraud, or duress against either the other or a third person, bribery of a third person, or the use of an official position to prevent the exercise of the right." *Id.* A retaliatory arrest claim may be analogized to a Restatement § 865 claim because the basis for a retaliatory arrest claim involves a law enforcement officer who, through the use of an official position, consciously and intentionally deprives a citizen of his right to free speech by arresting him for an improper purpose.

Furthermore, no element of probable cause or other such reasonable belief exists in the text of Restatement § 865. Thus, the defenses provided in Restatement § 890 apply. Restatement § 890 provides that "[m]ost of the privileges . . . are conditioned upon

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[29] The right to vote may be considered an extension of the freedom of speech. *See* Armond Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 YALE L. & POL'Y REV. 471, 485 (2016) (arguing that the right to vote is fundamental and should be deserving of full First Amendment protection because it serves a clear expressive function).

their being performed for the purpose of protecting the interest for which the privilege was given . . . [which] is illustrated in cases where force is used . . . in the prevention of crime . . . ." RESTATEMENT § 890 cmt. c. (Am. Law Inst. 1939). Consequently, in a Restatement § 865 claim, a law enforcement officer using his official position would not be privileged if he intentionally prevented an individual from voting for a purpose other than the prevention of crime. This may be applied to a retaliatory arrest claim, in which an arrest made substantially for the improper purpose of retaliation rather than for the proper purpose of preventing crime would not be excused, similar to *Hawley*, 54 Barb. 490, as discussed *supra*, with respect to a law enforcement officer acting with malice or bad motive. A retaliatory arrest claim, therefore, need not be supported by lack of probable cause; rather, a plaintiff need only establish that the arrest was substantially motivated by the improper purpose of retaliating against the plaintiff for his exercise of free speech.

Accordingly, the common law and Restatement (First) of Torts support the Ninth Circuit rule and entirely harmonize with the *Mt. Healthy*, 429 U.S. 274, framework.

CONCLUSION

Amici respectfully submit that this Court should affirm the Ninth Circuit's decision and reject Petitioners' argument that an absence-of-probable-cause element should be required in a 42 U.S.C. § 1983 First Amendment retaliatory arrest claim.

Respectfully submitted,

MICHELLE OTERO VALDÉS
Counsel of Record
MEGEN MADISON GOLD
CHALOS & CO, PC
2030 South Douglas Road
Suite 117
Coral Gables, FL 33134
(305) 377-3700
mov@chaloslaw.com

Counsel for Amici Curiae

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